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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 592

CHARLES H. GRIFFITHS, Trustee in Reorganization of GENERAL STORES CORPORATION,

Petitioner,

against

LEWIS J. RUSKIN, Collateral Trustee,

Respondent.

PETITION FOR CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR F. GAYNOR,
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Of Counsel:

FREDERICK P. CLOSE,
MARTIN DRAZEN

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PETITION FOR CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays for cross-writ of certiorari to review a portion of the judgment of the United States Court of Appeals for the Second Circuit entered herein on August 26, 1959.

Opinions Below

The opinion of the District Court is reported at 164 F. Supp. 130 and is printed at pages 22-61 of the Appendix submitted herewith. The opinion of the Court of Appeals (269 F. 2d 827) is printed at pages 62-77 of the Appendix.

Jurisdiction

The order of the Court of Appeals was entered on August 26, 1959. On November 24, 1959 an application for an extension of time to file a petition of certiorari was made by counsel for the collateral trustee to Mr. Justice Harlan. Notice of said application was received by the attorney for the Reorganization Trustee on November 27, 1959 which was after the 90 day period provided for in 28 U.S.C. § 2101. By order dated November 26, 1959 Mr. Justice Harlan extended to and including December 15, 1959 the time of the collateral trustee to file his petition for writ of certiorari. A motion in the Court of Appeals by the Reorganization Trustee, for leave to file a petition for rehearing out of time was denied by said Court, without opinion, on December 11, 1959. The Reorganization Trustee claims the order by Mr. Justice Harlan also extended the time for him to file this petition for a cross-writ. The inequitable situation of counsel waiting for the last day to request an extension of time, in order to have the time run against the Reorganizatin Trustee, requires the automatic extension of time for this cross petition to be filed. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether a provision in a collateral agreement securing a note which provides for an increase in the rate of interest in the event of default, violates the public policy of the Bankruptcy Act where there has been no default in payment of interest or principal and where the only default claimed is filing a petition pursuant to Chapter 11 of the Bankruptcy Act?

2. What is the nature and extent of a reorganization court's equitable powers with respect to the disallowance of interest where the debtor corporation proves to be

solvent? The Court of Appeals decision would limit the applicability of the case of *Vanston Bondholders Committee* v. *Green*, 329 U. S. 156, to insolvent corporations, thereby restricting the reorganization court's equitable powers with respect to interest, to rights as between creditor and creditor and give it no power with respect to rights between creditors and stockholders.

3. Is the equitable power of a reorganization court with respect to interest limited to the disallowance of a claim for interest on interest, or may the Court under appropriate circumstances disallow a claim for additional simple interest?

Statutes Involved

The statutory provisions involved are Bankruptcy Act, Sections 115, 328; 11 U.S.C. Sections 515, 728. They are printed at page 21 of the Appendix.

Statement of the Case

On October 18, 1954 the debtor filed a petition for an arrangement of its unsecured creditors pursuant to Chapter 11 of the Bankruptcy Act, with the acquiescence and participation of the secured creditors (29*). In that proceeding the debtor was continued in possession. Upon the application of a stockholder and the United States Securities and Exchange Commission, the District Court ordered that the petition be amended to comply with Chapter X or the petition would be dismissed (Opinion per Dimock, J., 129 F. Supp. 801). On appeal that order was affirmed by the Court of Appeals for the Second Circuit on April 14, 1955 (222 F. 2d 234). Certiorari was granted by the United States Supreme Court on October 10, 1955 (350 U. S. 809) and after argument the order

* Folio references of numerals only refer to the Appendix filed herewith.

was affirmed with an opinion handed down on March 26, 1956 (350 U. S. 462).

By petition dated April 30, 1956, the debtor filed an amendment of its petition under Chapter XI to conform to the provisions of Chapter X. On May 1, 1956 the District Court (Levet, J.) approved the amended petition and appointed Charles H. Griffiths, as disinterested Trustee in Reorganization. In due course a plan of reorganization was approved by the creditors and stockholders and the plan was confirmed by the reorganization court on May 21, 1958. There was no appeal from the order of confirmation.

The plan of reorganization adopted provided for payment in full in cash of principal as well as interest, compensation and expenses "which the courts may finally determine to be payable" on the claims of the secured creditors (Lewis J. Ruskin and Rexall Drug Company) and the Trustee under a collateral agreement dated May 19, 1954 (Lewis J. Ruskin).

Two promissory installment notes (originally aggregating $2,065,000.00) given by the debtor to the secured creditors on May 19, 1954 provided for interest at the rate of four (4%) per cent per annum and further provided that upon the occurrence of an "event of default" as defined in the collateral agreement, the total unpaid principal could be declared due and payable, in which event interest at the rate of six (6%) per cent per annum would accrue.

The only provision of the collateral agreement affecting the rate of interest on the principal indebtedness is found in Section 5 of Article VI (23A*) which provided that if an event of default as defined in Section 1 of Article VI (19A) exists, and the notes are declared due and payable, "General will at the time when the notes are so declared due and payable, pay to the Trustee for the benefit of the holders of the Notes then outstanding, the whole amount

* Folio references followed by letter "A" refer to Appendix in the Court of Appeals.

then owing on such Notes, for interest and principal or both, as the case may be, and (if allowed by law), with interest upon the overdue principal and installments of interest at the rate of six per cent (6%) per annum".

On August 17, 1955 the Collateral Trustee sent a notice of acceleration of the indebtedness to the Debtor and claimed interest at the rate of 6% per anum from that date to the date of payment.

The reorganization court, after plenary hearings, determined that the lien of the secured creditors consisted of $2,050,000 of principal, and allowed interest at the rate of four (4%) per cent per annum (but did not increase the rate to six (6%) per cent as claimed by the secured creditors) and fixed the compensation of Lewis J. Ruskin as Collateral Trustee and his expenses, including attorneys fees.

Pursuant to an order of the reorganization court in aid of partial consummation of the plan of reorganization, on July 28, 1958, the Reorganization Trustee paid the Collateral Trustee the sum of $2,396,443.56, without prejudice to his additional claims then pending on appeal in the Court of Appeals for the Second Circuit. The reorganization court determined the amount and the Reorganization Trustee deposited adequate security for the additional claims of the Collateral Trustee and the lien of the Collateral Trustee and the secured creditors was transferred to the new security.

The Court of Appeals affirmed the District Court with respect to compensation and expenses of the Collateral Trustee, but by a divided Court held the secured creditors were entitled to the increased rate of interest from August 17, 1955, the date they accelerated the indebtedness.

On December 5, 1959 the Collateral Trustee filed a petition for a writ of certiorari to review that portion of the judgment of the Court of Appeals which affirmed the District Court with respect to compensation and expenses of the Collateral Trustee (Docket No. 569).

The Reorganization Trustee herein is filing for a cross-writ to review that portion of the judgment of the Court of Appeals which reversed the District Court and allowed the increased rate of interest.

Reasons for Granting the Cross-Writ

1. The attempt to distinguish the *Vanston* case by the Court of Appeals, on the basis of solvency, was erroneous.

(a) The debtor was insolvent at the time the petition was filed.

This proceeding was initiated under the provisions of Chapter 11 of the Bankruptcy Act on October 18, 1954, with the filing of an appropriate petition. At that time, the debtor stated in its petition that it could not meet its financial obligations as they became due. The testimony during the plan hearings was that some judgments had been entered against the debtor, some landlords had instituted proceedings to evict the debtor from certain store locations (R.B.* 1394) and the debtor was losing money from operations at an alarming rate.

The decision to close tobacco stores raised serious labor problems with the unions involved (R.B. 1817) and the debtor had created a reserve of $600,000 for anticipated losses in closing said stores. The financial statements filed at that time did not reflect the large number of additional rent claims which accrued against the debtor as a result of closing the balance of the tobacco stores during the Chapter 11 proceedings. The testimony during the plan hearings by Mr. Brown the Secretary-Treasurer of the debtor, showed that according to the books of the debtor, the debtor was insolvent in the bankruptcy sense as well as in the equity sense (Trustee's Exhibit 6, R.B. 30-36).

* R.B. stands for testimony, Record below.

On May 1, 1956 the United States District Court granted the petition of the debtor to amend the original petition to conform to the provisions of Chapter 10 of the Bankruptcy Act. Section 328 of the Bankruptcy Act provides in part as follows (21):

> "* * * Upon the filing of such amended petition, or of such creditors petition, * * *, such amended petition or creditors petition shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter."

Thus, the Chapter 10 petition is deemed to have been filed on October 18, 1954.

In the *Kanston* case this Court stated (p. 161):

> "What claims of creditors are valid and subsisting obligations against the bankrupt *at the time the petition in bankruptcy is filed*, is a question which, in the absence of overruling Federal Law, is to be determined by reference to State Law." (Emphasis added.)

During the plan hearings there was testimony with respect to the value of the stock of the debtor's subsidiaries and the debtor itself. The testimony of Duff, Anderson and Clark, the valuation experts retained by the Reorganization Trustee was on the value of the stock of the debtor's subsidiaries and of the debtor as of July, 1957, the time of the testimony. The testimony of Standard Research Consultants, Inc., the valuation experts retained by the secured creditors, also was as of the date of their testimony. In fact the latter's report was brought to date from April, 1957 to September, 1957 for the purpose of the plan hearing.

During this interim period of three years between the date the petition was filed and the date of the plan hearings, the debtor had the advantage of the earnings of its

subsidiaries of some $1,472,000, which were free of federal income taxes by virtue of filing consolidated income tax returns with the parent debtor, utilizing in part the large income tax losses of the debtor.

Here we have the anomalous situation of a debtor, insolvent at the time of filing of its petition but, becoming solvent during the proceedings, which debtor is now required to pay a penalty of an additional two per cent interest on the indebtedness due the secured creditors because the reorganization proceedings were successful.

(b) *The reorganization court is a court of equity and had authority to consider the claim of the secured creditors on an equitable basis.*

The court below noted the language used by this court in *Vanston* (p. 165) which was relied upon by the district court, namely:

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between the creditors and the debtor."

However the Court of Appeals below emphasized prior language of this court in that opinion to restrict the application of the above quotation and held the "contract" rate of 6% to apply, without regard to the equities.

Each quotation of the Court of Appeals below from the *Vanston* opinion in this Court contains the words "equitable" or "inequitable".

The Courts have recognized time and again that the bankruptcy and reorganization courts sit as courts of equity. In re *Kane*, 127 Fed. 552; *Johnson* v. *Norris*, 190 Fed. 459, 463; *American Surety Co.* v. *Sampsell*, 327 U. S. 269, 271; *Local Loan Co.* v. *Hunt*, 292 U. S. 234.

In *Pepper* v. *Litton*, 308 U. S. 295, 307-8, this Court said:

> "As we have said, the bankruptcy court in passing on allowances of claims sits as a court of equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowance of their claims in bankruptcy. In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate. And its duties so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director or stockholder. That is clearly the power and duty of the bankruptcy courts under the reorganization section."

And in *Vanston* this Court said (p. 165):

> "A Chapter X or § 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents. See *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527."

Section 115 of the Bankruptcy Act (21A) authorizes the reorganization court to exercise "all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor * * *."

The reorganization court does not cease to be a court of equity, merely because a particular debtor is solvent.

(c) *The trial court, after considering all of the facts and equities, found it would be inequitable to allow the secured creditors interest in excess of four percent.*

In the District Court, the Reorganization Trustee urged that because of certain actions by Lewis Ruskin and his

attorney, Harry Ruskin, prior to and at the time the debtor filed the Chapter 11 petition in that Court, the secured creditors were estopped from claiming that filing under Chapter 11 was an "event of default" under the terms of the Collateral Agreement. The Court found (29):

> "While there is proof that the secured creditors acquiesced in, and may to some extent have been instrumental in, bringing about General Stores original resort to this Court, I have concluded that the proof in this regard is insufficient to establish estoppel against default or acceleration."

The District Court gave four reasons for disallowance of the additional interest: *First*, the secured creditors by their own conduct in these proceedings may have been at least partially responsible for their protracted length.

Although the Collateral Trustee claimed he had the right to foreclose at all times after August 17, 1955, he did not attempt to foreclose on the collateral until after the decision of this Court (350 U. S. 462) made it clear that the Chapter 11 proceeding would be changed to Chapter 10. The principal reason for this delay was that he wanted to continue securing the tax savings to the subsidiaries obtained by filing consolidated returns with the Debtor (R.B. 4246). After the amendment to conform to Chapter 10, he was responsible for delay by making unnecessary motions to vacate the stay of foreclosure (49) and the appeal for that order was argued although by that time the plan had been amended to provide for payment in full (49). At the plan hearing almost the sole opposition was furnished by the Collateral Trustee. Curiously the Court of Appeals below without discussion, overruled the District Court with respect to the finding of delay (71) where the Court said

> "• • • where there is no showing that the creditor entitled to the increased interest caused any unjust delay in the proceedings • • •".

Second: The secured creditors were virtually insulated against any increase in risk which might ordinarily have resulted from the commencement of reorganization proceedings.

A. By the substantial value of the General Stores subsidiaries which were collateral security for the loan.

At the plan hearings Duff, Anderson and Clark, the experts retained by the reorganization Trustee testified to a value of $3,100,000 for the debtors subsidaries which constituted the collateral security held by the Collateral Trustee. The Collateral Trustee's experts, including himself, varied in their estimates from $1,600,000 to $2,000,000. Although the Court made no specific finding as to value (31), the adoption of the plan required a finding of more than $3,000,000 as the value of the subsidiaries in order to comply with the absolute priority doctrine.

B. By virtue of the Collateral Trustee's right to exercise control over the business of the subsidiaries by the nomination and selection of all the members of the board if both Ford Hopkins and Stineway. This was not a case of a secured creditor having to sit back while an incompetent debtor dissipated the value of the collateral by mismanaging the business. Arfiele III of the Collateral Agreement gave the Collateral Trustee such power, and in this situation the Reorganization Trustee and the debtor had to sit back while the business was managed by the Collateral Trustee exclusively. An example of the complete control of the Collateral Trustee over the Board of Directors of the subsidiaries is seen in the resolution adopted by those boards on June 19, 1958 authorizing payment to Lewis J. Ruskin for compensation denied him by the United States District Court. As the reorganization court stated in its opinion and order of July 1, 1958 (365A)

"Any action by such Boards therefore is solely Ruskin's."

The Court below did not add a third layer of insulation, namely the substantial tax benefits which accrued to the subsidiaries by virtue of filing consolidated federal income tax returns for the debtor. The tax savings amounted to $785,000 through the fiscal year ending September 28, 1957.

3. As a result of this proceeding, the secured creditors were paid in full on July 28, 1958 (aside from the sums involved on appeal) rather than May 11, 1964 which was the due date of the last installment pursuant to the terms of the original notes and the collateral agreement.

4. Allowance of the secured creditors claim for extra interest would to some extent inflate the capital structure of the reorganized corporation to the detriment of its stockholders and of those creditors who elect to accept its long term notes.

When all of these factors are added to the conceded fact that there was no default in the payment of principal or interest and this proceeding was instituted with the acquiescence if the not actual assistance of the secured creditors it is clear that the equities are as found by the District Court, in the favor of the debtor.

(d) *If Vanston is distinguishable on the basis of solvency, would the secured creditors be entitled to interest on interest?*

The provision of the collateral agreement which contemplates an increase in the interest rate is as follows:

> "General will at the time when the notes are so declared due and payable, pay to the Trustee for the benefit of the holders of the Notes then outstanding, the whole amount then owing on such Notes, for interest and principal, or both, as the case may be, and (if allowed by law) with interest upon the overdue principal and installments of interest at the rate of six per cent (6%) per annum".

Thus the collateral agreement provided for interest on interest. If the *Vanston* case is distinguishable from the instant case on the ground of insolvency, presumably the agreement with respect to interest on interest also would be enforceable.

The secured creditors did not claim interest on interest in this proceeding but apparently they would have been entitled to do so under the decision of the Court of Appeals below.

2. The reorganization court had authority to disallow a claim for additional simple interest and was not limited to interest on interest

The Court of Appeals below expressly avoided the question of whether the *Vanston* case was precedent for the reorganization Court to pass upon a claim based on a contractual provision for additional simple interest arising because the debtor sought the intervention of the Bankruptcy Laws (67). The Minnesota District Court in the case of *Wisconsin Central Railway Company*, 93 F. Supp. 579, expressly held that the *Vanston* case applied to the problem of additional simple interest. The controversy in that case was whether the 4% contract rate applied after maturity rather than the 6% New York statutory rate which applies when obligations calling for the payment of interest do not specifically fix the rate thereof.

The 8th Circuit in *United States Trust Company of New York v. Zelle*, 191 F. 2d 822, upheld the reorganization court in denying the increased interest relying on the *Vanston* case. That Court said:

> "(Page 825) The responsibility resting upon the trial court to weigh the equities and determine whether the rate of interest provided by the law of New York should be applied or whether equitable principles under the Bankruptcy Act required the fixing of a different rate, the sole remaining question of im-

portance is whether the trial court properly discharged their responsibility. * * * Can it be said with reason, logic and fairness that because the court prevented the payment of these bonds on maturity the debtor's estate shall be in a sense penalized by increasing the rate of interest theretofore paid 2 per cent per annum, amounting to an increase in interest charges of approximately $250,000 a year, to the financial detriment and disadvantage of other creditors? We have no hesitancy in reaching the conclusion that broad principles of equity forbid such a course of action. To increase the distribution to these bondholders over and above the amount they had been receiving in interest, because of the Court and the orderly administration of the debtor's estate for the purpose of bringing about a ratable distribution of the assets of that estate among all the creditors has prevented the payment of the bond at maturity, would in our judgment be inequitable and unjust to the other creditors."

The reorganization court was correct in extending the rationale of the *Vanston* case to a claim of additional simple interest.

3. It is against the policy of the National Bankruptcy Act to penalize a debtor for seeking the refuge of that law.

As was stated by Mr. Justice Black in the *Vanston* case:

"When and under what circumstances Federal Courts will allow interest on claims against debtors estates being administered by them has long been decided by federal law, *Cf. Board of Comm'rs of Jackson County* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289 * * *" (p. 163).

In the instant case the default claimed under the collateral agreement was the filing of a Chapter 11 petition in the Bankruptcy Court. There was no claim of default for non-payment of interest or principal.

On May 19, 1954 the debtor acquired all the issued and outstanding stock of a retail drug store chain known as Ford Hopkins Company, whose stores were located in Illinois and several surrounding mid-western states, from Lewis J. Ruskin, his wife and Rexall Drug Company at a price of $2,800,000. The terms of sale of Ford Hopkins Company required payment of $735,000 in cash and the balance in notes to Ruskin and Rexall to be paid in installments ending in 1964. As security for those notes all of the stock of Ford Hopkins Company and the stock of another subsidiary of the debtor, Stineway Drug Company, also a retail drug store chain located in Chicago, Illinois, was posted with Lewis J. Ruskin as Trustee for himself and Rexall under a collateral agreement dated May 19, 1954. Under the terms of that agreement Ruskin as Trustee had the right of management of both subsidiaries and was assigned all income, including management service fees, dividends and a portion of the annual depreciation. The first payment due was of principal in the sum of $7,500 on November 1, 1954 and another of $7,500 on December 1, 1954. The next payment was not due until October 1, 1955 and that payment was to be in the sum of $50,000, plus interest.

Thus, on October 18, 1954, the date the petition under Chapter 11 was filed, there was no default as to payment under the collateral agreement. The secured creditors by a letter dated November 1, 1954 had agreed to do nothing which would interfere with the Chapter 11 proceeding for a period ending July 18, 1955 (33A), and this time was extended to August 17, 1955 (35A). On the latter date, Ruskin as Trustee caused a notice of acceleration of the indebtedness to him to be sent to the debtor (36A). The only cash payments required to be made to that time, namely the two installments of principal of $7,500 were made pursuant to order of the Referee in Bankruptcy.

Under the terms of Article VII, Section 1 of the Collateral Agreement of May 19, 1954, General Stores assigned all

of its right to dividends on the stock of the subsidiaries, and the management service fees due from its subsidiaries to the collateral trustee. There were substantial earnings by the debtor subsidiaries most of which were available for distribution in the nature of dividends to the debtor if the collateral trustee had so elected. These sums amounted to at least the sum of $500,000 as of January 1, 1958, and had accrued during the intervening years.

Thus we have in the instant case a fact pattern where there was no default in the payment of principal or interest at the time of filing the petition in Chapter 11; where there were ample funds in the control of the Collateral Trustee with which to pay himself installments of principal and interest as they became due, so that there was in fact no claim by the Collateral Trustee at any time in this proceeding for a default because of non-payment of principal or interest (377A, 305A). This additional interest is to penalize the debtor for taking advantage of the Bankruptcy Act. *In re Tastyeast, Inc.*, 126 F. 2nd 879, 882 (CA 3).

The instant case therefore is so much stronger than the *Vanston* case where the Court said (p. 165):

> "Prior to the beginning of the equity receivership, Inland would have never owed interest on interest unless and until it had reached its obligation to pay simple interest promptly—on the date it was due. Before the receivership began, a failure by Inland to take coupons on the date they were due might have breached an existing obligation. This breach would have enclosed upon Inland, under the terms of the covenant, a duty to pay interest on the interest it had failed to pay. But when the equity receivership intervened, these interrelated obligations were drastically changed. The obligation to make prompt payment of simple interest coupons were suspended. In fact, both Inland and the receiver were ordered by the court not to pay the coupons on the dates they were, on their

face, were supposed to have been paid. The contingency which might have created a present obligation to pay interest on interest—i.e., a free decision by the debtor that it would not or could not pay simple interest promptly—was prohibited from occurring by order of the court."

In the case now under consideration there was no failure to pay, even during the Chapter 11 or Chapter 10 proceedings, because the Collateral Trustee had it within his power to pay himself the amounts due but he chose not to do so. Although he insisted upon it in his contract, the Collateral Trustee is not entitled to any added compensation in the way of interest merely because the debtor was obliged to seek the protection of the Bankruptcy Court and the Bankruptcy Act.

Congress adopted the reorganization sections to assist financially distressed corporations, and its intent will be frustrated if private agreements foisted on needy borrowers either proscribed utilization of the law, or penalized them solely for availing themselves of the law.

Conclusion

All of these points are of prime importance in the administration of reorganization proceedings and the reasons which led this Court to grant certiorari in the *Vanston* case are equally applicable here.

WHEREFORE petitioner respectfully requests this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Dated: December 15, 1959.

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Statutes Involved

"§ 515. Same: jurisdiction as in insolvency

Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

§ 728. Dismissal, proceedings: amended petition

The judge may, upon application of the Securities and Exchange Commission or any party in interest, and upon such notice to the debtor, to the Securities and Exchange Commission, and to such other persons as the judge may direct, if he finds that the proceedings should have been brought under chapter 10 of this title, enter an order dismissing the proceedings under this chapter, unless, within such time as the judge shall fix, the petition be amended to comply with the requirement of chapter 10 of this title for the filing of a debtor's petition or a creditors' petition under such chapter, be filed. Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 532 of this title, such amended petition or creditors' petition shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter."

Opinion of Levet, D.J., June 2, 1958

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Opinion in Respect to Claim of Secured Creditors for Interest, Trustee's Fees & Expenses, and Allowance for Attorneys' Fees, etc.

APPEARANCES:

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LEVET, D. J.

FACTS

On May 19, 1954, General Stores Corporation (hereinafter also called the debtor) in Chicago, Illinois, made and delivered its two promissory notes (attached to Secured Creditors' Exhibit F) to the secured creditors, Lewis J. Ruskin and Rexall Drug Company. The notes (originally totalling $2,065,000) provided for interest on principal at the rate of 4% per annum, and further provided that in case of an event of default as defined in the collateral agreement (Secured Creditors' Exhibit F) the total unpaid principal may be declared due and payable, in which event 6% interest was to accrue.

A collateral agreement by and between General Stores Corporation, said debtor, and Lewis J. Ruskin as trustee for the payees of the notes, which agreement was simultaneously entered into with the execution of the notes, provides, among other things, as follows:

> "If any one of the following events of default (hereby defined and entitled 'event of default' or

'events of default') shall occur: • • • or if any proceedings before Control Date involving General or any subsidiary (other than Ford or Stineway) thereof or any successors thereto, and after Control Date involving General, Ford or Stineway or any subsidiary thereof or successors thereto, are commenced by or against such company under any bankruptcy, reorganization, arrangement, insolvency or readjustment of debt, dissolution or liquidation law or statute of the Federal Government or any state government • • • ; then, in any such event, the holder or holders of any of the Notes then outstanding or the Trustee may, at their or his option, declare such Notes, to be, and thereupon such Notes shall become, forthwith, due and payable • • • " (Article VI, Section 1)

The notes covered the balance of the purchase price for all outstanding shares of stock of the Ford Hopkins Company. The debtor transferred to the collateral trustee, Lewis J. Ruskin, collateral, including all the outstanding stock of the Ford Hopkins Company and of the Stineway Drug Company, with all voting rights thereof. This collateral was pledged to secure, among other sums, payment of the principal and interest on the aforesaid notes.

On October 18, 1954, the debtor, General Stores Corporation, filed a petition for reorganization under Chapter XI of the Bankruptcy Act.

After certain preliminary negotiations, none of which were formally reduced to writing, Lewis J. Ruskin as trustee under the said collateral agreement entered into a so-called "standby agreement," dated November 1, 1954, which is here set forth in full:

"November 1
1 9 5 4

"General Stores Corporation
"New York City, N. Y.

"Gentlemen:

"For the purpose of allowing you an opportunity to effect an arrangement with your unsecured creditors in the proceedings instituted by you for an Arrangement under Chapter XI of the Bankruptcy Act, the undersigned Trustee under the Collateral Agreement dated May 19, 1954 agrees that provided and so long as no one or more of the following events (herein called 'events') occurs, to-wit: any action taken by you or anyone else to affect any of the rights of the Trustee or the Noteholders under the Collateral Agreement or the notes secured thereby, or you are adjudicated a bankrupt, or the pending Chapter XI proceedings is changed to Chapter X proceedings, or the principal payments on the notes secured by the Collateral Agreement payable November 1, 1954 and December 1, 1954, respectively, are not paid when due, the undersigned Trustee will not prior to July 18, 1955 foreclose the Trust Property held under the Collateral Agreement because of the institution by you of said proceedings for an Arrangement under Chapter XI of the Bankruptcy Act or your failure to pay in whole or in part interest payable on the notes secured by the Collateral Agreement on December 1, 1954 and January 1, 1955. Upon the occurrence prior to July 18, 1955 of any other event of default mentioned in Section 1 of Article VI of the Collateral Agreement or of any event herein mentioned this assurance not to foreclose shall thereupon terminate and be of no effect whatsoever.

"It is understood and agreed, and this assurance is accepted by you with the understanding that nothing herein contained shall affect or be deemed to affect any other rights or privileges of the Trustee or any rights whatsoever of the Noteholders or your obligations under the notes and Collateral Agreement.

"Very truly yours,

"[Signed] Lewis J. Ruskin
"as Trustee under the Collateral Agreement by and between General Stores Corporation and Lewis J. Ruskin, dated May 19, 1954."

(Secured Creditors' Exhibit 1)

On March 9, 1955, certain motions of Max Shlensky, a stockholder of General Stores, and the Securities and Exchange Commission were granted by Judge Dimock. The order, after denial of motion for reargument, provided:

"1. The motion by the Securities and Exchange Commission for leave to intervene in this proceeding for the purpose of moving to dismiss the debtor's petition herein, to deny confirmation of the proposed Chapter XI proceeding and to dismiss the arrangement herein, be and the same hereby is granted;

"2. The petition of General Stores Corporation for relief under Chapter XI of the Bankruptcy Act and the proceedings under Chapter XI, be and they hereby are dismissed unless on or before March 15, 1955, General Stores Corporation file an amended petition to comply with the requirements of Chapter X for the filing of a debtor's petition or unless on or before such date a creditors' petition under Chapter X be filed."

On or about April 14, 1955, the Court of Appeals of the Second Circuit affirmed the said order of the District Court in an opinion reported at 222 F. 2d 234.

Thereafter, certiorari was granted by the Supreme Court of the United States, and on or about March 26, 1956, the said order of the District Court and the said affirmance of the Court of Appeals of the Second Circuit was duly affirmed in an opinion reported at 350 U. S., 462.

On June 28, 1955, the "standby agreement" of November 1, 1954, was, at the request of the debtor, extended for thirty days to and including August 16, 1955. The provisions of the letter granting this extension are as follows:

> "The expiration date specified in my assurance not to foreclose is July 17, 1955.
>
> "Per your request, I hereby extend this expiration date 30 days to and including August 16, 1955.
>
> "It is understood that this letter is accepted by you with the understanding that nothing herein contained shall affect or be deemed to affect any other rights or privileges of the Trustee under the Collateral Agreement or any rights whatsoever of the Noteholders or your obligations under the notes and Collateral Agreements." (Secured Creditors' Exhibit L)

On August 17, 1955, Lewis J. Ruskin as trustee under the aforesaid collateral agreement and Lewis J. Ruskin individually and Rexall Drug Company, the payees of the notes, notified the debtor that they elected to declare the aforesaid notes to be "forthwith due and payable because of an event of default occurring and existing under said collateral agreement by reason of the proceedings involving General Stores Corporation under Chapter XI of the Bankruptcy Act, as amended, of the United States, commenced by General Stores Corporation and pending

to this date in the United States District Court of the Southern District of New York." (Secured Creditors' Exhibit J)

On October 28, 1955, Lewis J. Ruskin as said trustee under said collateral agreement further notified the debtor in writing, in part, as follows:

> "You are further advised that the principal amount of the notes secured by the Collateral Agreement dated May 19, 1954, namely, $1,594,248.63 on the note payable to the order of Lewis J. Ruskin and $455,751.37 on the note payable to the order of Rexall Drug Company, are past due and payable. They bear interest in accordance with their provisions at the rate of 6% per annum from and after August 17, 1955, when the notes were declared due and payable, and as of September 30, 1955, the interest payable on the note payable to the order of Lewis J. Ruskin aggregated $73,464.54, and the interest payable on the note payable to the order of Rexall Drug Company aggregated $21,002.29. Demand is hereby made and renewed for the immediate payment to the undersigned Trustee for the benefit of the holders of said notes of the whole amounts owing on such notes for principal and interest." (Secured Creditors' Exhibit N)

On or about April 30, 1956, the debtor filed an amended petition in this court asking for reorganization under Chapter X, and on May 1, 1956, the United States District Court for the Southern District of New York approved the amended petition and appointed Charles H. Griffiths trustee in the reorganization proceeding.

From the facts above set forth, it appears that the right of the secured creditors to foreclose is predicated upon (1) an alleged default by reason of the commence-

ment by the said debtor of reorganization proceedings under Chapter XI of the Bankruptcy Act, filed as above stated on October 18, 1954 (no other default was claimed); and (2) a notice of acceleration given by the said secured creditors on August 17, 1955, based upon the commencement of the said proceedings under Chapter XI of the Bankruptcy Act.

The reorganization trustee and Richard Goodman, a stockholder and creditor, contend that the secured creditors are estopped to rely upon the commencement of the Chapter XI proceeding as an event of default by reason of certain acts of Lewis J. Ruskin and of Harry M. Ruskin, his attorney. While there is proof that the secured creditors acquiesced in, and may to some extent have been instrumental in, bringing about General Stores' original resort to this court, I have concluded that the proof in this regard is insufficient to establish estoppel against default or acceleration.

The evident intent of the collateral trustee, Lewis J. Ruskin, in signing the so-called "standby agreement" of November 1, 1954 (Exhibit I) was to agree not to foreclose the trust property held under the collateral agreement prior to July 18, 1955. There is no indication that by this agreement the collateral trustee waived the default involved in filing the petition under Chapter XI of the Bankruptcy Act. The extension of this "standby agreement" on June 28, 1955 (Exhibit L) to August 16, 1955, was of like character.

The "standby agreement" and the extension thereof constituted, in my opinion, only an agreement by the collateral trustee to defer foreclosure. The fact that the collateral trustee gave no notice of foreclosure until April 13, 1956, does not constitute ground for concluding that default was waived. It may be that one of the reasons why the creditor delayed foreclosure related to the tax

situation of General Stores Corporation. There was no requirement that the creditor seek to foreclose before April 1956, or at any other particular time.

The fact that an order had been entered on March 7, 1955, dismissing the petitioner under Chapter XI "unless on or before March 15, 1955 General Stores Corporation file an amended petition to comply with the requirements of Chapter X * * *" is not, in my opinion, sufficient to erase the default created by the filing of the petition under Chapter XI. As above stated, the Court of Appeals upheld Judge Dimock's order and the United States Supreme Court affirmed. Later, the debtor filed an amended petition, this time under Chapter X rather than Chapter XI. The filing of such an amended petition is expressly authorized by Section 328 of the Bankruptcy Act, 11 USCA § 728. No interpretation of the collateral agreement can be used to obliterate the effect of the filing of the petition under Chapter XI as an event of default. Consequently, I have concluded that the principal of the notes was validly accelerated and became overdue on August 17, 1955. (The amount of the principal indebtedness then was $2,050,000.) The fact that other defaults may have occurred subsequent to October 18, 1954 is immaterial.

THE SECURED CREDITORS' CLAIM FOR INTEREST

The two promissory notes held by the secured creditors provide for interest on principal at the rate of 4% per annum prior to any default by General Stores and prior to acceleration of the debt by the collateral trustee, but provide for interest at the rate of 6% per annum after default and acceleration.

The secured creditors claim interest at 4% to August 17, 1955, and at the rate of 6% per annum thereafter. On that date, the secured creditors notified General Stores of their election to accelerate the debt by virtue of the commencement of Chapter XI proceedings, an event of default under the collateral agreement. As already stated, I have concluded that the principal of the notes was validly accelerated and became overdue on August 17, 1955.

The estate of the debtor is here sufficient in estimated value (although neither sold nor liquidated) to pay all of its debts, including at least 4% interest; the security has been productive of income during reorganization (although no dividends have been declared or paid to the debtor during reorganization), and the value of the security exceeds the amount of the debt. Therefore, even under the interest rules applicable to straight bankruptcy cases, the secured creditors are reasonably entitled to interest at the non-accelerated rate of 4% per annum. See Sexton v. Dreyfus, 219 U. S. 339 (1911); Brown v. Leo, 2 Cir., 1929, 34 F. 2d 127; in re Macomb Trailer Coach, Inc., 6 Cir., 1953, 200 F. 2d 611; Castaner v. Mora, 1 Cir., 1956, 234 F. 2d 710; in re Magnus Harmonica Corp., D. C. D. N. J., 1958, 159 F. Supp. 778. The absolute priority rule is applicable to this portion of the secured creditors' interest claim. See Consolidated Rock Products Co. v. DuBois, 312 U. S. 510 (1941); Eddy v. Prudence Bonds Corporation, 2 Cir., 1947, 165 F. 2d 157, cert. denied 333 U. S. 845 (1948).

However, there remains for determination the issue as to whether or not the secured creditors are entitled to interest at the accelerated rate of 6% per annum. Determination of this issue depends first upon whether this court has the equitable power to prevent the accrual of additional interest at the accelerated rate, and, second, upon whether the equities in this proceeding militate for or against the accrual of such additional interest.

The rule is now too clear for argument that a bankruptcy court is vested with broad equity powers and in a Chapter X proceeding is just as much a court of equity as its statutory and chancery antecedents. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 165 (1946); In re Schafer's Bakeries, D. C. E. D. Mich., 1957, 155 F. Supp. 902, 913; see also Pepper v. Litton, 308 U. S. 295 (1939). In Vanston Bondholders Protective Committee v. Green, supra, the court in the exercise of its equitable powers denied the first mortgage bondholders' claim for interest on interest accruing after receivership.

The secured creditors have sought to distinguish the Vanston case from the instant proceeding on a number of grounds. For example, they contend in substance that the decision in the Vanston case is applicable only to interest on interest in the nature of penalty and not to extra interest which constitutes liquidated damages for increased risk. They further argue that whether a contract provision is one for a penalty or for added compensation is determined by applicable state law.

In the Vanston case, Mr. Justice Black, speaking for the majority of the court, expressly noted that the extra interest covenant there involved might be deemed added compensation for the creditor or "something like a penalty to induce prompt payment of simple interest." 329 U. S. at p. 166. However, he concluded that in either event equitable principles required a denial of the claim.

While the Vanston case involved a claim for interest on interest, the principles there enunciated are, in my opinion, applicable to a claim based upon a contractual provision for additional simple interest. The latter form of contractual provision may, and in the instant proceeding does, provide for a substantially larger return to the creditor than would a provision for interest on interest, and the need for equitable regulation is equally vital.

Equally without merit is the secured creditors' contention that the validity of their claim for additional interest is determined by state law. In this regard Mr. Justice Black stated:

> "When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. Cf. Board of Comm'rs of Jackson County v. United States, 308 U. S. 343; Royal Indemnity Co. v. United States, 313 U. S. 289 * * *" Vanston Bondholders Protective Committee v. Green, supra, at p. 163.

The secured creditors seek to distinguish the Vanston case on the further ground that the default which there gave rise to the claim for extra interest resulted from the court's suspension of the debtor's obligation to pay an installment of interest when due, whereas in the instant proceeding the default resulted from the debtor's "voluntary" act of filing a Chapter XI petition.

In the Vanston case, the court did not direct the receiver to pay the interest installment when due and thereby precipitated a default because "the debtor could not pay." (329 U. S. at p. 159). In the instant proceedings, General Stores filed a petition in reorganization for essentially the same reason. To term the default in the Vanston case "involuntary" and the default in the present proceeding "voluntary" is to ignore substance for form. In both cases, the defaults arose out of the financial helplessness of the debtors and in each a need for equitable relief arose. Yet, under the distinction here urged by the secured creditors, this court would be powerless to provide equitable relief with respect to the accrual of extra interest during reorganization, where, by contractual provision, the very act of resorting to reorganization is made an event of default.

Considerations of fairness and justice clearly require that a bankruptcy court have the equitable power to disallow a claim for extra interest accruing during reorganization regardless of whether an event of default occurred before or after the commencement of reorganization proceedings and irrespective of whether or not the default resulted under court order.

In In re Schafer's Bakeries, D. C. E. D. Mich., 1957, 155 F. Supp. 902, the corporate debtor obtained $87,500 from a creditor in return for two notes totalling $103,150, payable in 24 monthly installments commencing June 1, 1954. Each note provided for interest at the rate of 1½% per month upon each installment payment from the due date thereof until paid. The debtor paid the first monthly installment due June 1, 1954, but defaulted on the second installment due July 1, 1954. The debtor commenced Chapter X proceedings on July 13, 1954. Though the creditor was ultimately paid the full face value of the notes, it, nevertheless, sought to recover interest at the rate of 1½% per month on all defaulted installments from the due date of each installment until the same was paid. The court permitted a recovery of interest on the July 1, 1954 installment from that date until the filing of the reorganization petition. However, it disallowed the creditor's claim for interest during reorganization since the face amount of the notes already included substantial compensation to the creditor for the use of its money. In so holding the court stated:

> "Since the amount of the notes in the sum of $103,150 has been paid in full, it is clear that Woodward has already received simple interest on these loans and has been well recompensed for the use of its money. Any further payment by the trustee under the prevailing circumstances, except interest on the second installment to July 13, 1954, heretofore al-

> lowed, would only constitute a penalty for the late payment of those portions of the overdue installments representing the principal sum loaned. * * *" (p. 914)

In the Schafer's Bakeries case the court exercised its equitable power to disallow a claim for extra interest during reorganization even though the original event of default occurred prior to the filing of the Chapter X petition. The court not only refused to allow what it termed "interest on overdue interest," but also refused to allow "interest on that part of each overdue installment that constitutes repayment of principal." 155 F. Supp. at p. 913.

In the Schafer's Bakeries case the debt apparently was not accelerated and the extra interest was sought only on those installments which actually became overdue. Here, the secured creditors seek additional interest on the entire unpaid balance of their loan. Their claim for extra interest is many times larger, and the need for the exercise of equitable control is, therefore, at least as great, if not proportionately greater, than was true in the Schafer's Bakeries case, supra.

The secured creditors argue that the equitable doctrine with respect to extra interest enunciated in the Vanston case, supra, is not appropriate where the contest is between the stockholders and a secured creditor, and the debtor is solvent. The following portion of the Vanston opinion is pertinent in this regard:

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or *between creditors and the debtor.* See Sexton v. Dreyfus, supra [219 U. S. 339] at 346." * * *" (Emphasis supplied) (329 U. S 156, 165)

Under the amended plan of reorganization in the instant proceeding, the secured creditors' claim for extra

interest, if allowed, would be paid by Richard Goodman, who, in turn, and in consideration therefor, would receive additional shares of stock in the reorganized corporation. The granting of the secured creditors' additional interest claim would thus result in an inflation of capital structure without any commensurate increase in the assets of the reorganized corporation. The condition thereby created and its detrimental effects upon the financial future of the reorganized corporation is of concern not only to the stockholders whose equity in General Stores would be proportionately decreased, but also to those creditors who elect to accept long-term notes of the reorganized corporation. In my opinion, this court, under the circumstances here presented, has the power to disallow the secured creditors' claim for extra interest if the equities so require.

In re International Hydro-Electric System, D. C. D. Mass., 1951, 101 F. Supp. 222, does not require a contrary conclusion. There, the court, acting on a recommendation of the Securities and Exchange Commission, allowed a claim by the holders of debenture bonds (in the principal amount of over $26,000,000) for interest on interest which accrued during the course of a rearrangement under the Public Utility Holding Company Act. The court in substance held that under the circumstances there involved, equity required a payment of the extra interest claim of the debenture bondholders.

Consequently, and in accordance with the foregoing premises, and after a careful consideration of the equities in the present proceeding, I have concluded that the secured creditors' claim insofar as it relates to extra interest at the 6% rate should be disallowed for the following reasons:

(1) The secured creditors by their own conduct in these proceedings may have been at least partially responsible for their protracted length;

(2) The secured creditors were virtually insulated against any increase in risk which might ordinarily have resulted from the commencement of reorganization proceedings:

(a) By the substantial value of the General Stores subsidiaries which were collateral security for the loan; and

(b) By virtue of the collateral trustees' right to exercise certain control over the business of the subsidiaries by the nomination and selection of all of the members of the board of both Ford Hopkins and Sfineway in the event of a default. (See Article III of the Collateral Agreement, Exhibit F)

(3) As a result of this proceeding, the secured creditors will be paid in full some years before their loan would otherwise have matured in its entirety;

(4) Allowance of the secured creditors' claim for extra interest would to some extent inflate the capital structure of the reorganized corporation to the detriment of its stockholders and of those creditors who elect to accept its long-term notes.

The secured creditors argue that they are equitably entitled to all of the interest sought by them since, at least at the outset of these proceedings, they attempted to cooperate with General Stores in finding a solution to its financial difficulties. The cooperative attitude which the secured creditors exhibited prior to and during the Chapter XI proceeding, in my opinion, constituted nothing more than sound business judgment and enlightened self-interest. To have acted otherwise might have subjected the collateral security to the uncertainties of a forced sale and a possible financial loss to the secured creditors. The initial forbearance practiced by the secured creditors will

be rewarded by payment of their loan in full with interest at the non-accelerated rate of 4% per annum. No further reward is, in my opinion, warranted.

It is alleged by the reorganization trustee that there were funds available in the subsidiary corporations which under the collateral agreement (Article VII, Section 1) could have been applied toward payment of the indebtedness owed to the secured creditors. As of January 1, 1958, such payments through the subsidiaries could allegedly have amounted to $500,000. While the collateral trustee undoubtedly had the contractual right to apply certain moneys of the subsidiaries toward payment of General Stores' indebtedness to the secured creditors, he was under no legal obligation to do so. To have withdrawn these funds from the subsidiaries might have imperiled their financial position to the detriment of all concerned. Under these circumstances, the secured creditors are, in my opinion, entitled to interest at the non-accelerated rate on the entire amount of unpaid principal owing to them.

Accordingly, the secured creditors are allowed interest on all unpaid balances at the rate of 4% per annum; and so much of their claim as seeks interest at 6% per annum after August 17, 1955 is disallowed.

THE APPLICATION OF LEWIS J. RUSKIN FOR COMPENSATION AS COLLATERAL TRUSTEE

Pursuant to the collateral agreement of March 19, 1954 between General Stores Corporation and Lewis J. Ruskin as trustee (Exhibit F), Lewis J. Ruskin has petitioned this court for an allowance for his services as such collateral trustee.

As heretofore explained, this collateral agreement (Exhibit F) assigned and transferred to Lewis J. Ruskin as trustee all the outstanding shares of stock in the Ford

Hopkins Company and in the Stineway Drug Company, including the voting rights thereof. This collateral was so pledged to Lewis J. Ruskin as said trustee to secure the payment of principal and interest on two promissory notes of the debtor bearing the date of May 19, 1954, one payable to the petitioner, Lewis J. Ruskin, and one payable to the Rexall Drug Company.

Article VIII, Section 1, subdivision (2) of this collateral agreement (Exhibit F) is as follows:

> "Section 1. The trustee accepts the trust of this Collateral Agreement upon the following terms and conditions to which General and holder and holders of the Notes secured hereby agree:
>
> • • •
>
> "(2) The Trustee shall be entitled to reasonable compensation for all services rendered in the execution of the trusts hereby created, to be paid, for services *prior* to the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof *by* the *holders of the Note ratably*, and for services *after* the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof, by *General;* and for such payment, the Trustee shall have a lien on the Trust Estate and all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes." (Emphasis supplied)

On the face of this provision, therefore, the following principles apply:

(1) The services concerned must be those rendered in the "execution of the trusts;"

(2) The compensation must be "reasonable;"

(3) It is only after a default that the trustee is entitled to look to the debtor for payment;

(4) For these services the collateral trustee is to have a lien on the trust estate and all funds in the hands of the trustee in priority to the rights and claims of the holder or holders of the notes.

The principal services allegedly rendered by the collateral trustee were as follows:

(1) The collateral trustee directed the companies in a policy of closing small-volume and marginal stores and opening new type large-volume self-service stores and ethical drug stores;

(2) He directed the acquisition of another chain of drug stores, known as Wright & Lawrence, Inc.;

(3) When profits of the so-called "Huron division," which division comprised the sale of drugs on racks at super markets, began to diminish by reason of direct drug purchases by such chains, the collateral trustee developed a group of independently owned drug stores called "System stores," to which the subsidiaries made sales;

(4) The collateral trustee revised the type of item placed in the rack jobbing operations in the grocery chains to include items bringing a higher profit margin;

(5) The collateral trustee provided for weekly "operating committee" meetings, at which heads of the respective divisions of operations took action on all operating problems and where the executives were counselled and guided by the collateral trustee.

While certain of these policies may have been advisable and even necessary, none were unusual. They were in accord with, but not in advance of, the business trends of the drug industry current at that time. No convincing evidence of the necessity of the trustee's activities in the execution of these policies for the purpose of the execution of his trust appears. The purchase of the Wright & Lawrence, Inc. chain by the subsidiaries of the debtor, allegedly induced by the trustee, can hardly be considered in the field of the "execution of the trust." Rather, it partook of an owner's expansion.

As to general services rendered by the collateral trustee, he contends that he was personally present at the offices of Ford Hopkins and Stineway about ten or eleven times a year for about four days during each visit. While not in Chicago, he stated that he was in constant touch by telephone (usually from Scottsdale, Arizona) with the executives and department heads; that he studied reports on which he spent no less than ten to twenty-four hours per week; that he kept in touch with industry trends by observing rack jobbing and other operations in various parts of the country; and that he determined and directed the policies for the companies.

He alleges that since October 18, 1954, when General Stores Corporation filed its petition in the Chapter XI proceeding, the task of directing the business of the two subsidiaries became complicated; that he attended certain plan hearings in New York City; that he had negotiations with Richard Goodman in respect to a plan or a settlement; that he performed miscellaneous other services.

Prior to the sale of the stock of Ford Hopkins and Stineway to General Stores Corporation on May 19, 1954, Lewis J. Ruskin was the dominant figure in Ford Hopkins. Continuing with the period starting May 19, 1954, Lewis J. Ruskin was a member of the board of directors of both corporations.

The principal bases on which this collateral trustee claims the rendition of said services became necessary are:

(1) There were no executives available in the companies, or who could be secured, who were capable of coordinating the work of the two subsidiary corporations; and

(2) The peculiar status of the two corporations created hazards and problems by reason of the fact that the stock had been hypothecated by General Stores Corporation, which later came under reorganization proceedings, first under Chapter XI, which proved abortive,[1] and subsequently under the present proceeding of Chapter X.[2]

This court is not impressed with the argument that no executive connected with the two companies was capable of conducting the necessary supervision. Even if that were so, there is no substantial evidence to indicate that such an executive could not have been hired. Lewis J. Ruskin had been concerned in drug chains for many years. He had received a substantial amount in payment for what he sold. The indicated value of the collateral appears to have been adequate security. Much of his activity was spontaneous self-interest.

There was, in my opinion, nothing improper in Lewis J. Ruskin's acting as collateral trustee in spite of the fact that he was one of the persons who is a beneficiary thereof as a holder of one of the notes. General Stores Corporation had consented thereto in any event, and I

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[1] In re General Stores Corporation, D. C. S. D. N. Y., 1955, 129 F. Supp. 801, affirmed 2 Cir., 1955, 222 F. 2d 234, affirmed 1956, 350 U. S. 462.

[2] In re General Stores Corporation, D. C. S. D. N. Y., 1957, 147 F. Supp. 350; In re General Stores Corporation, D. C. S. D. N. Y., 1957, 150 F. Supp. 868, affirmed 2 Cir., 1958, 250 F. 2d 875.

fail to see anything invalid about such a relationship under these circumstances.

The valuation of such services depends primarily upon the following factors: (1) Were the services rendered in the execution of the trust? (2) What is the reasonable compensation therefor?

Certain of the expenses of the collateral trustee have already been paid directly or on his behalf by the subsidiaries.

The collateral trustee contends that the minimum value of his services must be based upon his salary as an executive of one of the subsidiary chains prior to the sale of May 19, 1954, when he received $35,000 to $40,000 a year. With this contention the court does not agree. Lewis J. Ruskin here served not as chief executive of a chain, but as a trustee of collateral—that is, the corporate stock of the subsidiaries.

Counsel for the Securities and Exchange Commission has asserted that the fair and reasonable value of the services rendered by the collateral trustee in the execution of his trust did not exceed $6,000 a year since the filing of the Chapter X proceeding (April 30, 1956) and that payment should be made only from that date (S. M. 4726). As already stated, however, default occurred on October 18, 1954. In the opinion of this court, the services of the collateral trustee to some extent contributed to the stabilization in management of the two subsidiaries concerned; in part the success of these corporations during the period in question came from attention which the collateral trustee's control effected; and during the period of reorganization under Chapter X this collateral trustee had certain increased responsibilities.

Consequently, it is my conclusion that the collateral trustee should be awarded compensation at the rate of $6,000 a year for the period from October 18, 1954 to

April 30, 1956, and $9,000 a year for the period from May 1, 1956 to December 31, 1957.

Thus, therefore, when so computed, the collateral trustee is entitled to the following sums:

October 18, 1954 to April 30, 1956 at $6,000 per annum	$ 9,215.00
May 1, 1956 to December 31, 1957 at $9,000 per annum	$15,000.00
TOTAL	$24,215.00

PETITION OF LEWIS J. RUSKIN AS COLLATERAL TRUSTEE FOR DETERMINATION OF THE AMOUNT OF THE LIEN UPON THE COLLATERAL FOR ATTORNEYS' FEES

Under the collateral agreement of May 19, 1954 (Exhibit F), above mentioned, Lewis J. Ruskin as collateral trustee asks for an allowance with which to compensate attorneys. The relevant provision of this collateral agreement is Article VIII, Section 1, subdivision (3), which reads as follows:

> "Section 1. The Trustee accepts this trust of this Collateral Agreement upon the following terms and conditions to which General and the holder and holders of the Notes secured hereby agree:
>
> * * *
>
> "(3) The Trustee may employ agents, attorneys and counsel in the execution of said trusts, who may also be the attorneys and counsel of the holder or holders of said Notes, and of Ford and Stineway, or their successors, or any one or more of them, and

the reasonable compensation of the Trustee's attorneys and counsel and of any other person as the Trustee may employ in the administration and management of the trusts hereunder, and all other reasonable expenses necessarily incurred or actually disbursed hereunder, General agrees to pay to the Trustee on demand; and for such payment, the Trustee shall have a lien on the Trust Estate, and on all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes."

It is thus evident:

(1) That this subdivision provides for the employment of attorneys by the trustee;

(2) That these attorneys may also be the attorneys and counsel for the holder of the notes and for Ford Hopkins and Stineway;

(3) That the compensation must be reasonable.

The trustee seeks to recover compensation for two sets of attorneys, to wit, Ruskin & Rosenbaum of Chicago, Illinois, and Paul, Weiss, Rifkind, Wharton & Garrison of New York City. For services, the trustee seeks reimbursement to pay Ruskin & Rosenbaum the sum of $80,000, and Paul, Weiss, Rifkind, Wharton & Garrison the sum of $100,000. No claim is made for any services prior to October 15, 1954. The default by filing the reorganization petition occurred on October 18, 1954.

Although the collateral trustee may be authorized to employ two or more attorneys if necessary, it has been held that the fact that two attorneys were employed does not mean that they should be allowed a fee twice as much as that to which a single attorney would be entitled. (Spe-

cialty Products Co., Inc. v. Universal Industrial Corp., D. C. M. D. Penn., 1937, 21 F. Supp. 92, 94)

In general, these services related to the following matters:

(1) Arrangements with creditors to secure the delivery of merchandise immediately after the filing of the Chapter XI proceeding on October 18, 1954, when creditors were concerned;

(2) Preparation of notice of acceleration, matters connected with the Chapter XI proceeding and appeals therein;

(3) Conferences with Richard Goodman;

(4) Conferences with the reorganization trustee, Charles H. Griffiths, in the Chapter X proceeding;

(5) Preparation of proof of claim;

(6) Original motion to vacate stay of foreclosure (see In re General Stores Corporation, 147 F. Supp. 350);

(7) Second motion to vacate stay of foreclosure (see 150 F. Supp. 868);

(8) Opposition to and attempts to vacate order of restraint on the subsidiaries of July 1, 1957;

(9) Appeals from the order denying the vacation of the stay against foreclosure and order granting the restraint (see 250 F. 2d 875);

(10) Preparations for and attendance at plan hearings;

(11) Attending at hearings before bankruptcy referee in reference to the claim of Richard Goodman.

In opposition to this application the reorganization trustee and others objecting thereto point out, among other things, the following:

(1) *That there was certain duplication of services rendered by the New York and Chicago firms of attorneys involved.*

To some extent this is apparent. It is true that the subsidiaries involved were located in the Chicago area and that the reorganization proceedings took place in New York where the debtor, General Stores Corporation, had its office. Consequently, it was necessary to obtain factual information from Chicago in many instances. However, it is a well established principle that attorneys are not to be paid lawyers' fees for performing non-legal services. (See Finn v. Childs Co., 2 Cir., 1950, 181 F. 2d 431, 437) Many, if not all, of the facts required by the New York firm could have been obtained without an intermediary and directly through either Lewis J. Ruskin, the collateral trustee, or at his request through the officers or managers connected with the two subsidiaries. With the retainer by the collateral trustee of experienced counsel, such as that of the New York firm, the constant shuttling of papers (and Chicago counsel) back and forth appears to have been unnecessary. Moreover, a considerable part of the services allegedly rendered by Ruskin & Rosenbaum consisted of conferences between Rosenbaum and Harry H. Ruskin, or vice-versa, as the case may be. While, as indicated, undoubtedly a trustee is entitled to hire more than one attorney, the employment of a substantial firm with eminent counsel in New York hardly warrants duplicative advice or effort. The function of Ruskin & Rosenbaum for the most part appears to have been (1) securing information from the subsidiaries; (2) consulting with New

York counsel; and (3) advising Lewis J. Ruskin of determinations and actions taken in New York.

The attendance by Harry H. Ruskin at the plan hearings and on the motions made to vacate the stay of foreclosure was unnecessary and, hence, unreasonable. The collateral trustee was represented by eminent counsel who usually was accompanied by one associate and one assistant. At times, Lewis J. Ruskin, the collateral trustee, and officers of the subsidiaries were also present.

Duplication deserves careful consideration in the fixing of fees. Wasteful labor should not bring compensation. Finn v. Childs Co., 2 Cir., 1950, 181 F. 2d 431, 436; Newman & Bisco v. Real Associates Securities Corp., 2 Cir., 1949, 173 F. 2d 609.

(2) *That certain of the services rendered related to matters as to which legal action or advice by the collateral trustee's counsel was unnecessary.*

Again, to some extent, I must agree with this contention. Richard Goodman purchased or caused to be purchased various shares of stock of the debtor and various claims against the debtor. The collateral trustee through his attorneys at all times claimed that the debt owed to the noteholders was prior to that of all other claimants insofar as security in the collateral was concerned. This was disputed by no one. The fact that there were certain questions raised by the reorganization trustee with regard to the purchase of the Goodman claims, which had been acquired at a discount, and which may have related to effects on other creditors in no way involved the secured creditors. Consequently, the claim for any legal services and attendance before the bankruptcy referee at the time of the Goodman hearing is without foundation. Mere participation never creates a right to compensation. Milbank, Tweed & Hope v. McCue, 4 Cir., 1940, 111 F. 2d 100, 101;

In re Paramount Publix Corporation, 2 Cir., 1936, 85 F. 2d 588.

Although the secured creditors cannot be criticized for a reasonable effort to collect their claim, the motion made to vacate the stay of foreclosure was in fact premature. The repetition of such motion and the appeal therefrom were of questionable necessity or value. (See Ruskin v. Griffiths, 2 Cir., 1958, 250 F. 2d 875.) The collateral trustee and his attorneys proceeded with the appeal in spite of the fact that the plan of reorganization, even as originally submitted, provided for full payment, although deferring a portion thereof; that the substantial collateral available was worth much more than the amount of the extended credit when the initial motion was made. The amended plan provided for payment in full in cash on consummation of the plan. This court must consider such factors in connection with the evaluation of claims for attorneys' fees herein made.

(3) *That Ruskin & Rosenbaum during the period for which compensation is sought for them by the collateral trustee were receiving an annual retainer of $15,000 from Ford Hopkins.*

Some of the services related to Ford Hopkins and affected the subsidiaries directly rather than the collateral trustee. Although not substantial, this is a factor to be considered.

(4) *That the negotiations, particularly in the beginning of the initial phases thereof with Richard Goodman, were not such services as the collateral trustee necessarily required or for which he may properly be compensated in the hiring of counsel.*

For the most part, at least prior to the submission of the Goodman plan in the Chapter X proceeding, these negotiations largely related to the proposed transfer of the

notes from Lewis J. Ruskin and Rexall to Goodman. The fact that at times Lewis J. Ruskin, an experienced business man who lived in Scottsdale, Arizona, may have chosen to delegate personal business negotiations to his brother, Harry H. Ruskin, an attorney, is not sufficient to warrant substantial payment here.

(5) *That the issues involved were not complex.*

The objectants pointedly and correctly assert that the chief issue involving the secured creditors, and, hence, the collateral trustee, was the collection of their claim. The collateral trustee at all times asserted an absolute right to an "indubitable equivalent," namely, payment in full in cash on the line without deferment. If such a right existed, it may have been imperative but it was not complex. There is inadequate proof to indicate that the extensive time involved in preparing lengthy briefs was necessary for the protection of the collateral trustee and his trust, especially at a time when there had been no determination by this court that the plan presented was worthy of consideration.

The collateral trustee avers that the strategic and persistent opposition of his counsel was responsible for the results ultimately obtained. In the opinion of this court, this is not entirely correct. Some credit must be allotted to the reorganization trustee and to other factors.

Ruskin & Rosenbaum submit a time statement between October 15, 1954 and December 13, 1957 totalling 1,895 hours. This firm asks for $80,000. As already mentioned, a certain amount of time was in conferences between Rosenbaum and Harry H. Ruskin, perhaps 250 hours. What was in fact accomplished in these conferences is somewhat obscure. Some of it appears to be duplication of work done by the New York firm; parts of the work of Ruskin &

Rosenbaum appear to have been in effect acting as a fact-acquiring medium between the New York firm and the subsidiaries; other parts appear to be concerned with trips to New York and unnecessary court appearances accompanying counsel who represented the collateral trustee; some of the services, as already indicated, appear to have been more directly concerned with the subsidiaries and for which the Chicago firm was receiving an annual retainer. It may be noted that active participation in court by Harry H. Ruskin began only when this court was considering these allowances and interest.

The New York firm, seeking payment of $100,000, set forth a time schedule of some 2,031 hours. Of this amount, the services of the chief counsel for the collateral trustee involved at least 265 hours, while the remainder was contributed by a partner in the amount of 58 hours, by another associate or partner in the amount of 664 hours, and approximately one-half was that of a junior associate of three-years' experience, who spent some 1,026 hours. As already indicated: (1) Certain of the so-called "services" were definitely unnecessary; (2) Portions, at least, of the services rendered were of dubious necessity at the time rendered; (3) Certain duplication or overlapping occurred.

Attorneys' fees cannot be fixed with mathematical certainty. (Calhoun v. Stratton, 6 Cir., 1932, 61 F. 2d 302, 303) We are left only with a measure termed "reasonable." (Sampsell v. Monell, 9 Cir., 1947, 162 F. 2d 4, 6) The following elements as matters properly to be considered, when fees of an attorney are to be fixed, were approved by Judge Woolsey when a member of this court:

> . . . . (1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situ-

> ation. (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing." In re Osofsky, D. S. S. D. N. Y., 1931, 50 F. 2d 925, 927.

The mere expenditure of time is not controlling either as a ceiling or as a floor. The compensation of a lawyer cannot necessarily be fixed by the time he was actually engaged. (Adair Lumber Co. v. Atchison T. & S. F. Ry. Co., D. C. W. D. Mo., 1937, 19 F. Supp. 415, 417) The value of a lawyer's services is not measured by time or labor merely. (Woodbury v. Andrew Jergens Co., D. C. S. D. N. Y., 1930, 37 F. 2d 749, 750) It is evident that the time must be fairly and properly used.

> "* * * One thousand plodding hours may be far less productive than one imaginative, brilliant hour. * * * when hours become a criterion, economy of time may cease to be a virtue. * * *"; George D. Hornstein, "Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards," 69 Harvard Law Review, 658, 660 (1956).

The quality of skill required was not unusual. There were no extraordinary features; there was one central legal problem—whether the secured creditors were entitled of right to be paid in cash at once or whether $670,000 could be deferred over a period of five or six years. The differential could by no means exceed this accomplishment.

The fact that approximately half of the recorded time spent by the New York firm was contributed by a junior associate must be weighed. Finn v. Childs Co., 2 Cir., 1950, 181 F. 2d 431, 437.

Here, we are concerned with a trust in which the fundamental premise on which the allowance is made must be based upon what is fair and reasonable under the circumstances of the particular case. The necessity of the services depends in the first instance upon whether or not the proceedings initiated were reasonably essential to the protection of the trust. The amount allowed should bear a reasonable relationship to the demands of the situation.

Between October 15, 1954 and April 30, 1956, the firm of Ruskin & Rosenbaum were the only attorneys acting for the collateral trustee. The New York firm was not engaged until about April 30, 1956. The services rendered by Ruskin & Rosenbaum in the period above mentioned included:

(1) Conferences of Harry H. Ruskin with Marks F. Paskes of Otterburg, Steindler, Houston & Rosen in reference to General Stores filing a Chapter XI petition;

(2) Preparation and drafts, redrafts and revisions of a so-called "forbearance agreement" or "standby agreement;" conferences in reference to the same with Paskes and Rosen of the Otterbourg firm, Lewis J. Ruskin, Rexall, Catchings of General Stores; conferences with Clark Earle [sic] of General Stores;

(3) Conferences in respect to requests of Ford Hopkins suppliers growing out of the filing of the Chapter XI proceeding;

(4) Conferences in regard to matters relating to the Chapter X proceeding after filing, including the Shlensky application;

(5) Conferences with the collateral trustee with regard to closing certain stores of General Stores;

(6) Extension of the "standby agreement;"

(7) Investigation of law with respect to possible Chapter X status;

(8) Conferences with Paskes in respect to appeals to the Court of Appeals, Second Circuit, from the determination of Judge Dimock of the United States District Court, Southern District of New York, and with respect to the appeal to the Supreme Court from the determination of the Second Circuit;

(9) Miscellaneous services.

The Securities and Exchange Commission recommends that Ruskin & Rosenbaum for these services in this period be awarded the sum of $5,000.

As to the period between May 1, 1956 and December 31, 1957, the Securities and Exchange Commission recommends the sum of $55,000 for the joint services of the two law firms. It is the conclusion of the court that a joint award is the only feasible approach. Both firms participated. Their services were mingled. To attempt a separate appraisal is impractical.

In Scribner & Miller v. Conway, 2 Cir., 1956, 238 F. 2d 905, the Court of Appeals of this circuit made it clear that recommendations of the Securities and Exchange Commission with respect to allowances in reorganization are entitled to the greatest weight. The court in a per curiam opinion there stated:

> "In Finn v. Childs Co., supra, 2 Cir., 181 F. 2d 431, we held under the circumstances there disclosed that the recommendation for allowances of the S. E. C., made by this responsible and disinterested public agency after close familiarity with the entire proceed-

> ings and careful study and report, should be followed unless the reorganization judge showed reasons otherwise based on specific findings. See also In re Solar Mfg. Corp., 3 Cir., 215 F. 2d 555. * * *" (p. 907)

The facts of the present case demonstrate that the allowances which are now sought in this proceeding are predominantly reorganizational allowances. The claims which form the basis of this application grow out of the filing of the debtor's petition for reorganization in Chapter XI on October 18, 1954. The services for which the collateral trustee requests payment and the expenses for legal services for which he seeks reimbursement relate in one way or another to the Chapter XI and Chapter X reorganization proceedings.

Under the provisions of the plan of reorganization as approved by order of this court dated May 21, 1958, as I have previously intimated, Richard Goodman or his nominees agree to invest in the company a minimum of $1,100,000 in cash, for which he is or his nominees are to receive shares of common stock at $1.00 per share. (See Plan, Article III, Section B.3.) Moreover, any deficiency in funds needed to consummate the plan is to be advanced by Goodman, for which he will receive new common stock at the price of $1.00 per share. (See Plan, Article III, Section D.)

Consequently, although the claim of the collateral trustee may be contractual in origin, the payment of disbursements of the collateral trustee for attorneys' fees affects the debtor in this reorganization as fully as if there were a sale and liquidation in bankruptcy. Any increase in payment of this claim results in the issuance of more common stock (to Goodman) with some consequent dilution of the holdings of the other stockholders. Creditors who accept notes are also affected by this capital structure.

It has been held by an eminent member of the Court of Appeals of the Second Circuit, when sitting as a district judge, that the fact that a lien may be contractually based does not alter the fact that the fixation of the value is a reorganizational function. See In re New York, New Haven & Hartford Railroad Company, D. C. D. Conn., 1942, 46 F. Supp. 236, 239 (opinion by Hincks, J.).

In Finn v. Childs Co., 2 Circ., 1950, 181 F. 2d 431, the present chief Judge, Clark, stated:

> "* * * We have often been admonished by the Supreme Court that in allowances of this sort we must avoid 'vicarious generosity.' In re Gilbert, 276 U. S. 294, 48 S. Ct. 309, 72 L. Ed. 580, and that 'the desire to reduce the cost of reorganization [was] one of the controlling reasons for the enactment' of the bankruptcy statutes. Callaghan v. Reconstruction Finance Corp., 297 U. S. 464, 469, 56 S. Ct. 519, 521, 80 L. Ed. 804; Realty Associates Securities Corp. v. O'Connor, 295 U. S. 295, 299, 55 S. Ct. 663, 79 L. Ed. 1446; Dickinson Industrial Site, Inc. v. Cowan, 309 U. S. 382, 388, 60 S. Ct. 594, 84 L. Ed. 819; Brown v. Gerdes, 321 U. S. 178, 181-182, 64 S. Ct. 487, 88 L. Ed. 659; In re New York Investors, 2 Cir., 79 F. 2d 182, 185, certiorari denied Endelman v. Reconstruction Finance Corp., 296 U. S. 649, 56 S. Ct. 308, 80 L. Ed. 462. * * *"
> (p. 435).

After a careful, independent consideration of the facts, examination of the affidavits and statements of the collateral trustee and his attorneys, and after reviewing the minutes, exhibits, briefs, motions, appeals and proceedings involved herein, this court is of the opinion that the sum of $5,000 is a fair, reasonable and adequate sum for allowance to the collateral trustee for payment of the firm of Ruskin & Rosenbaum for the period between October 15,

1954 and April 30, 1956, and that the sum of $55,000 is a fair, reasonable and adequate sum to be awarded to the said collateral trustee for payment for the combined services of Ruskin & Rosenbaum and Paul, Weiss, Rifkind, Wharton & Garrison for the period from on or about April 30, 1956 to December 15, 1957. Consequently, it is so found by this court. Any allowance to the collateral trustee for similar expenses after December 15, 1957 must be modest.

CLAIM OF COLLATERAL TRUSTEE FOR DISBURSEMENTS

Lewis J. Ruskin, collateral trustee, in addition to compensation for services of counsel, also seeks to have his account settled with respect to disbursements which he allegedly made or incurred pursuant to the collateral agreement. The original account submitted with the petition as Secured Creditors' Exhibit AAA, verified December 12, 1957, was amended, at the direction of the court, on March 6, 1958, and this amendment was received by this court on March 11, 1958.

The following items of this account as amended are disallowed for the reasons hereinafter stated:

(1) Disbursements in the amount of $156.11 to Ruskin & Rosenbaum for the period of December 6, 1956 to December 7, 1956.

From the original petition of Lewis J. Ruskin and the affidavit of Harry H. Ruskin thereto attached, it appears that these disbursements are for Harry H. Ruskin's trip to New York. The main purpose of this trip was a conference with members of the Rifkind firm and to appear in court on a motion to vacate the restraining order. I do not believe this trip was necessary on the part of Harry H. Ruskin at that time.

(2) Certain bills of the New York attorneys for disbursements entitled "Overtime and related expenses," are as follows:

(a) April 25, 1956 through December 31, 1956	$188.93
(b) January 1, 1957 through May 31, 1957	$163.83
(c) June 1, 1957 through November 30, 1957	$290.48

There is no proof in this record of any necessity for overtime. No application was made at any time by the collateral trustee or his attorneys for adjournment of any motion. No reasons for haste existed. If they did exist they were created solely by the collateral trustee. Accordingly, these items are disallowed.

(3) The collateral trustee asks allowance for payment to the New York firm in the period from June 1, 1957 to November 30, 1957 of $183.15 for meals. This item is disallowed.

(4) Item of February 7, 1957 to February 8, 1957, paid to Ruskin & Rosenbaum for expenses in connection with a trip to New York in the amount of $159.76, is disallowed. This trip appears to have been made for the main object of attending the continued hearings on the Goodman objections. As elsewhere herein indicated, the collateral trustee had no stake in that matter. This was unnecessary and, therefore, is disallowed.

(5) Item dated February 18, 1957 to February 20, 1957, paid to Ruskin & Rosenbaum in the total amount of $300.46, is reduced as follows:

(a) $188.54 for round trip airplane fare of Harry H. Ruskin and J. Rosenbaum is reduced one-half to ..... $ 94.27

(b) $71,56 for hotel bill is likewise reduced by one-half to ..... $ 35.78,
making a total reduction in this item of $130.05,
and, therefore, allowed at $170.41
instead of $300.46. In my opinion, Mr. Rosenbaum's attendance with Mr. Ruskin was wholly unnecessary.

(6) Payment to Lewis J. Ruskin for trustee's expenses covering hotel during New York hearing, June 16, 1957 to June 25, 1957, in the amount of $645.89, is reduced to $300.

(7) Standard Research Consultants, Inc. The original bill of Standard Research Consultants, Inc. ($11,211.79), although generous, is allowed. The subsequent bill for a total of $7,786.74 is reduced to $2,708.47. The collateral trustee produced no proof from any source as to the value of Standard's services or even proof that Standard performed services as billed. The collateral trustee made no investigation to check the bill of Standard, which investigation, it appears to me, he was duty-bound to make.

(8) The collateral trustee is allowed the cost of one transcript, but not two. No necessity for two is shown. The cost of the transcript in the amount of $106.50 of the Goodman hearing before the referee is disallowed.

Consequently, as settled, the disbursement account of the collateral trustee is allowed as follows:

The trustee, as shown in the amended accounting of March 10, 1958, is charged with the sum of			$22,456.28
He sought credit for expenses paid of	$19,970.29		
He is allowed		$18,399.87	
He seeks credit for unpaid bills rendered of	$ 9,716.13		
He is allowed		$ 3,971.40	$22,371.36
Thus, he is charged with a net amount of			$ 84.92

The alleged counterclaim and set-off set forth for the benefit of the debtor as against Lewis J. Ruskin, individually and as collateral trustee, under Par. (47) of Richard Goodman's answer of January 24, 1958, are dismissed.

The secured creditors are entitled to a lien for the balance of principal in the sum of $2,050,000.00 and interest thereon at the rate of 4% to the date of payment.

In accordance with this opinion, therefore, the amount of the lien of the collateral trustee is as follows:

For services of Lewis J. Ruskin, collateral trustee	$24,215.00
The collateral trustee is charged with the sum of $84.92 in accordance with the account for disbursements and expenses as hereinbefore stated.	
For allowance to the collateral trustee for services of Ruskin & Rosenbaum from October 15, 1954 to April 30, 1956	$ 5,000.00

For allowance to the collateral trustee for the joint services of Ruskin & Rosenbaum and Paul, Weiss, Rifkind, Wharton & Garrison for the period from on or about April 30, 1956 to December 15, 1957 ..... $55,000.00

The foregoing is intended to encompass Findings of Fact and Conclusions of Law.

Settle order on notice.

Dated: New York, N. Y., June 2, 1958.

Richard H. Levet
United States District Judge

Opinion of United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 219—October Term, 1958.

(Argued March 11, 1959 Decided August 26, 1959.)

Docket No. 25317

In the Matter of

GENERAL STORES CORPORATION, Debtor.

LEWIS J. RUSKIN, Collateral Trustee

v.

CHARLES H. GRIFFITHS, Trustee in Reorganization

Before:

WASHINGTON, WATERMAN, and MOORE,
Circuit Judges.

Appellant petitioned the U. S. District Court for the Southern District of New York to award him payments of interest and compensation from funds in its hands belonging to a debtor in reorganization under Chapter X of the Bankruptcy Act, claiming them to be due under a collateral trust agreement. This appeal is from an order, Levet, J., making awards of less than the amounts claimed. Opinion below reported at 164 F. Supp. 130. Reversed in part and affirmed in part.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON; RUSKIN and ROSENBAUM (Simon H. Rifkind, Harry H. Ruskin, John E. Massengale, Irving Younger, of counsel), New York City, *for Appellant, Lewis J. Ruskin.*

FREDERICK P. CLOSE (Martin Drazen, of counsel), White Plains, New York, *for Trustee in Reorganization, Appellee.*

LOUIS J. WEINSHENKER (Edward A. Gorenstein, Walter Goodman, of counsel), New York, *for Richard Goodman, Stockholder.*

RICHARD GOODMAN, Stockholder, Chicago, Ill., *pro se.*

THOMAS G. MEEKER, General Counsel; David Ferber, Asst. General Counsel; Pace Reich, Melvin Katz, Attorneys, SEC; Richard V. Bandler, Special Counsel; Kiva Berke, Attorney, *for Securities and Exchange Commission.*

WATERMAN, *Circuit Judge*:

On May 19, 1954 Lewis J. Ruskin, his wife, and the Rexall Drug Company sold all the stock of a retail drug store chain known as Ford Hopkins Company to General Stores Corporation. The purchase price was $2,800,000, of which $735,000 was to be paid in cash and the balance by notes to Ruskin and Rexall payable in installments until 1964. As security for these notes all the stock of Ford Hopkins and all the stock of Stineway Drug Company, another drug store chain owned by General Stores, was transferred to Ruskin as trustee for himself and for

Rexall under a "Collateral Agreement" entered into simultaneously with the execution of the notes. Ruskin, as trustee under this agreement, had the right to elect a majority, or, after default, all the members of the Boards of Directors of these corporations. The notes were to accrue interest on principal at the rate of 4% per annum, but the collateral agreement provided that in case of an "event of default" as defined in that agreement the then total unpaid amount could be declared due and payable forthwith, and interest would then accrue upon overdue payments at the rate of 6% rather than at 4%. One "event of default" provided for in the agreement was as follows:

> "[I]f any proceedings before Control Date involving General or any subsidiary (other than Ford of Stineway) thereof or any successors thereto, and after Control Date involving General, Ford or Stineway or any subsidiary thereof or successors thereto, are commenced by or against such company under any bankruptcy, reorganization, arrangement, insolvency or readjustment of debt, dissolution or liquidation law or statute of the Federal Government or any state government, * * *; then, in any such event, the holder or holders of any of the Notes then outstanding or the Trustee may, at their or his option, declare such Notes to be, and thereupon such Notes shall become, forthwith, due and payable * * *"

The agreement also provided that the trustee was to be entitled to "reasonable compensation" for all the services he might render in the execution of the trusts and, in connection therewith, for his attorneys and counsel. This compensation was to constitute a prior lien on the trust estate and on all funds in the hands of the trustee.

In October 1954 the debtor, General Stores, filed a petition for arrangement under Chapter XI of the Bankruptcy Act. However, instead of accelerating the debt because of this petition, Ruskin entered into a standby agreement with debtor, dated November 1, 1954, wherein he agreed that unless certain specified conditions occurred he would not foreclose prior to July 18, 1955. On March 7, 1955, the United States District Court for the Southern District of New York granted similar motions by a shareholder of debtor and by the Securities and Exchange Commission to dismiss debtor's petition unless it was amended so as to comply with the requirements of Chapter X of the Bankruptcy Act. *In re General Stores Corporation*, 129 F. Supp. 801 (S. D. N. Y. 1955). One month later we affirmed that decision, *General Stores Corporation* v. *Shlensky*, 222 F. 2d 234 (2 Cir. 1955). On August 17, 1955, Lewis J. Ruskin as trustee under the collateral agreement, Lewis J. Ruskin individually, and Rexall Drug Company notified the debtor that they elected to declare the notes "forthwith due and payable because of an event of default occurring and existing under said collateral agreement by reason of the proceedings involving General Stores Corporation under Chapter XI of the Bankruptcy Act * * * commenced by General Stores Corporation and pending to this date in the United States District Court for the Southern District of New York." The Supreme Court of the United States affirmed our decision in *General Stores Corporation* v. *Shlensky* on March 26, 1956, 350 U. S. 462, and about one month later the debtor filed an amended petition asking for reorganization under Chapter X of the Bankruptcy Act. The district court approved the amended petition on May 1, 1956 and appointed a reorganization trustee.

This appeal stems from a petition filed by Ruskin, as trustee under the collateral agreement, seeking a deter-

mination of the amount of his claim on the unpaid notes, principal and interest, and of the amount of his lien for his own and his attorneys' compensation. Ruskin claimed unpaid accrued interest at 4% to August 17, 1955, the date of the acceleration, and 6% thereafter. As compensation for his services as trustee Ruskin sought, at the rate of $35,000 per annum, $112,715.13 for the period October 18, 1954 to January 7, 1958. He also sought $180,000 as compensation for his attorneys. The court below decided that the post-default interest rate should remain at 4% rather than be increased to 6%; awarded Ruskin $24,215 as total compensation for his own services as collateral trustee, and granted attorneys' fees in the amount of $60,000. *In re General Stores Corporation*, 164 F. Supp. 130 (S.D. N.Y. 1958). The parties seem to agree that the debtor is solvent.

From these several determinations Ruskin appeals. The reorganization trustee, a stockholder of the debtor, and the Securities and Exchange Commission are all in opposition.

The Claim for Increased Interest

Although the contract between the parties explicitly provided that interest was to be at 6% rather than 4% after acceleration, the district court refused to allow the additional 2% interest. Relying upon *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156 (1946), *rehearing denied*, 329 U. S. 833 (1947), it held that Ruskin was not entitled to the benefit of his variable interest contract. We disagree with that holding.

In *Vanston* the Supreme Court disallowed an indenture trustee's claim against an insolvent debtor for interest on interest payments provided for in the trust indenture. The interest on interest accrued because the district court,

pursuant to its administration of an equity receivership, had ordered both the debtor and the receiver not to pay simple interest coupons that fell due under the indenture after the court assumed jurisdiction. Even if we agreed with the court below that a Supreme Court precedent dealing with an obligation for interest on interest falling due because of an equity court's stay order is equally applicable to a claim based upon a contractual provision for additional simple interest arising because the debtor sought the intervention of the bankruptcy laws, a question we need not now decide, we would still have to distinguish *Vanston* on what we find was a basic ground of that decision. In *Vanston* the debtor was insolvent, and in our case it appears the debtor is solvent. In *Empire Trust Co. v. Equitable Office Bldg. Corp.*, 167 F. 2d 346 (2 Cir. 1948), we avoided a resolution of the effect of *Vanston* upon parties to a reorganization proceeding involving a solvent corporation, but the issue is squarely before us now, and we hold that the Supreme Court did not intend that the principle enunciated by it in *Vanston*, in a contest between creditors, should be applied to a contest between a debtor's creditor and its stockholders.

The Supreme Court held in *Vanston* that since the district court had taken over the debtor's assets for the purpose of preserving and protecting them "pending a ratable distribution among all the creditors according to their interests as of the date the receivership began," it would have been contrary to that purpose and inequitable to the junior creditors to have junior creditors suffer and the mortgage bondholders enriched because of a stay order required to further the receivership aim. This result naturally followed from an examination of the usual rules that deal with simple interest claims in bankruptcy and in reorganization proceedings. *In re*

Wisconsin Cent. Ry. Co., 93 F. Supp. 579, 582 (D. Minn. 1950), *affirmed*, 191 F. 2d 822 (8 Cir. 1951), *cert. denied*, 343 U. S. 944 (1952). Thus, with respect to simple interest the Supreme Court said:

> "The general rule in Bankruptcy and in equity receivership has been that interest on the debtor's obligations ceases to accrue at the beginning of proceedings. Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved * * * Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay." 329 U.S. at 163-64.

However, the Court carefully noted that this rule with respect to simple interest did not apply where the contest was between a creditor and stockholder of the debtor:

> "But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor." 329 U.S. at 164.

Since the result the Court reached stemmed from the equitable principles developed with respect to creditors' claims for simple interest in bankruptcy and equity receivership proceedings, and since it explicitly noted that these principles favored the debtor's creditors over its stockholders, the Court could hardly have meant that the rule it was declaring was to be applied in the case of a solvent debtor.

The district court decided that a result opposite to the one we reach here is dictated by that language in the *Vanston* opinion which states:

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor." 329 U.S. at 165.

It seems to us, however, that when this language is read in context it does not support the decision of the district court. It follows after a discussion of two differing situations.

> "To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors . . . But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor." 329 U.S. at 164.

and refers only to that discussion. See *In re Realty Associates Securities Corporation*, 163 F. 2d 387, 392 (2 Cir. 1947) (dissenting opinion of Clark, *J.*), *cert. denied*, 332 U.S. 836 (1947).

Of the many cases cited to us only two seem worthy of attention. *In re Schafer's Bakeries*, 155 F. Supp. 902 (E. D. Mich. 1957), relied upon by the district court, might be persuasive authority for the decision below if it were clear that that case involved a solvent debtor. However, there is nothing in the opinion to indicate that it did, and, since the plaintiff's claim for interest on interest was successfully contested by an "Unsecured Creditors' Committee,"

it would seem that the debtor was actually an insolvent one. Certainly the court never pointed out whether the debtor there was solvent or insolvent, or discussed this distinction. On the other hand, in *In re International Hydro-Electric System*, 101 F. Supp. 222 (D. Mass. 1951), the Massachusetts district court carefully considered this very problem when it held:

> "[I]t is important that IHES is not at the present time insolvent. It has assets more than sufficient to meet all claims of its creditors. No benefit will be given to the debenture holders at the expense of any other class of creditors. The burden of this payment will fall entirely on the interest of the stockholders. They cannot complain that they are treated inequitably when their interest is cut down by the payment of a sum to which the debenture holders are clearly entitled by the express provisions of the trust indenture. The situation here differs from that in Vanston Bondholders Protective Committee v. Green * * * where the payment of interest on deferred interest payments was not allowed even though called for by the trust indenture, because the payment would have reduced the share of subordinate creditors in the reorganization of an insolvent corporation."

A variable interest provision in event of a stated default such as we have here is not a penalty, nor should it be considered unconscionable. Compare *Union Estates Co.* v. *Adlon Const. Co.*, 221 N. Y. 183 (1917) with *Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 510 (1916). It can be beneficial to a debtor in that it may enable him to obtain money at a lower rate of interest than he could otherwise obtain it, for if a creditor had to anticipate a possible loss in the value of the loan due to his debtor's bankruptcy or reorganization, he would need to exact a higher uniform

interest rate for the full life of the loan. The debtor has the benefit of the lower rate until the crucial event occurs; he need not pay a higher rate throughout the life of the loan.

Undoubtedly the debtor filed its petition under Chapter XI because it believed it beneficial to itself to do so, and in a case such as this, where there is no showing that the creditor entitled to the increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act.

Ruskin's Claim for Compensation Under the Collateral Agreement

Article VIII, Section 1(2) of the collateral agreement provided as follows:

> "Section 1. The Trustee accepts the Trust of this Collateral Agreement upon the following terms and conditions to which General and the holder and holders of the Notes secured hereby agree:
>
> * * * * * *
>
> "(2) The Trustee shall be entitled to reasonable compensation for all services rendered in the execution of the trusts hereby created, to be paid, for services prior to the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof by the holders of the Notes ratably, and for services after the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof, by General; and for such payment, the Trustee shall have a lien on the Trust Estate and all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes."

Pursuant to this section Ruskin claims $112,715.13 from debtor for his services from October 18, 1954 computed to January 7, 1958, at $35,000 per annum. These services allegedly consisted of directing the policy of closing small volume or marginal stores and opening large volume self-service stores; directing the acquisition of the Wright and Lawrence chain of drug stores; directing the development of "system stores" and the placing of higher profit margin items in the rack jobbing operations in the grocery chains when the profits of the so-called "Huron division" servicing these grocery chains began to diminish because of direct drug purchases by these chains; directing the weekly meetings of "operating committees" wherein Ruskin counseled and guided the company executives; making personal visits to the offices of the subsidiaries in Chicago ten or eleven times a year for four days at a time; while at home in Arizona, keeping in constant contact with the executives and studying reports sent to him; and generally keeping in touch with industry trends and directing the companies' policies. Looking at the question of compensation in terms of what it found were the requirements of Article VIII, Section 1(2) of the collateral agreement—i.e., that services be rendered in the "execution of the trusts" and the compensation be "reasonable"—the district court allowed Ruskin a total of $24,215. In an order entered July 1, 1958, upon what was in effect a petition for a rehearing, the district court reaffirmed this allowance.

The fixing of allowances is not only the most thankless task in all of the problems of judicial reorganization, it is also the most delicate. *Scribner & Miller* v. *Conway*, 238 F. 2d 905 (2 Cir. 1956); *Finn v. Childs Co.*, 181 F. 2d 431 (2 Cir. 1950). And see *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 2 Cir., 266 F. 2d 862. Consequently an appellate court would be less than wise if it did not rely

heavily for guidance in such matters upon the SEC which functions as a responsible and disinterested public agency, *Scribner & Miller* v. *Conway, supra; Finn* v. *Childs Co., supra,* and the district court whose intimate knowledge of the whole reorganization gives it a peculiar advantage, *Johnson* v. *Carolina Scenic Stages*, 242 F. 2d 263 (4 Cir. 1957); *Finn* v. *Childs Co., supra; Milbank, Tweed & Hope* v. *McCue*, 111 F. 2d 100 (4 Cir. 1940). In this case the rate of compensation recommended by the SEC would have entitled Ruskin to a sum somewhat less than $20,000. Since this is approximately $5,000 less than the district court awarded him it would require a strong showing by Ruskin in order for us to award him an additional sum, or to remand this case to the district court for reconsideration. While the district court pointed out that "the services of the collateral trustee to some extent contributed to the stabilization in management of the two subsidiaries concerned," and that "in part the success of these corporations during the period in question came from attention which the collateral trustee's control effected," it found that there was no convincing evidence to show that all or even a large portion of Ruskin's activities were necessary to properly execute the purpose of his trust—i.e., the purpose of seeking that the note holders were properly secured. Also the court found that there was no substantial evidence to indicate that an executive capable of conducting the necessary supervision of the two subsidiaries was not in their employ, or could not have been hired by them, and therefore services rendered by Ruskin for which he sought compensation as a trustee were unnecessary. After an examination of the record we are not convinced that the district court's findings and award are clearly erroneous.

Claim for Compensation for Attorneys' Fees

Ruskin's last contention on this appeal is that the district court did not allow him sufficient compensation for attorneys' fees. His claim for $180,000 for the period between October 15, 1954 and December 13, 1957 was predicated under Section 1(3) of Article VIII of the collateral agreement. That section provides:

> "The Trustee may employ agents, attorneys and counsel in the execution of said trusts, who may also be the attorneys and counsel of the holder or holders of said Notes, and of Ford and Stineway, or their successors, or any one or more of them, and the reasonable compensation of the Trustee's attorneys and counsel and of any other person as the Trustee may employ in the administration and management of the trusts hereunder, and all other reasonable expenses necessarily incurred or actually disbursed hereunder, General agrees to pay to the Trustee on demand; and for such payment, the Trustee shall have a lien on the Trust Estate, and on all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes."

$80,000 of the claim was for the Chicago law firm of Ruskin & Rosenbaum and $100,000 was for the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison. After careful consideration of the items of Ruskin's claim and upon the advice of the SEC, the district court allowed Ruskin & Rosenbaum the sum of $5,000 for the period between October 15, 1954 and April 30, 1956, and made a joint award of $55,000 for the combined services of Ruskin & Rosenbaum and Paul, Weiss, Rifkind, Wharton & Garrison for the period from on or about April 30, 1956 to December 15, 1957.

Ruskin contends that the district court committed error in making these awards because it applied a wrong standard in evaluating counsel's services. He argues that the court rewarded these two firms only for services that brought forth actual benefits accruing to the debtor's estate rather than for the services which, pursuant to contract, they rendered to him as collateral trustee. We find nothing in the district court's opinion which would indicate that it applied the standard which Ruskin contends it did apply. Rather, all the indications we find are to the contrary. Thus:

> "There is inadequate proof to indicate that the extensive time involved in preparing lengthy briefs was necessary for the protection of the collateral trustee and his trust * * *" 164 F. Supp. at 145.
>
> "Here, we are concerned with a trust in which the fundamental premise on which the allowance is made must be based upon what is fair and reasonable under the circumstances of the particular case. The necessity of the services depends in the first instance upon whether or not the proceedings initiated were reasonably essential to the protection of the trust. The amount allowed should bear a reasonable relationship to the demand of the situation." 164 F. Supp. at 146.

The district court fully realized that it was making an award under a contract between the debtor and Ruskin. It was also aware, and rightly so, that the award would be paid from a reorganization debtor's assets. *Newman & Bisco* v. *Realty Associates Securities Corp.*, 173 F. 2d 609 (2 Cir. 1949); *Butzel* v. *Webster Apartments Co.*, 112 F. 2d 362 (6 Cir. 1940). Consequently, in order to avoid that "vicarious generosity" which the courts have so often deplored, *Finn* v. *Childs Co.*, 181 F. 2d 431 (2 Cir. 1950), it considered in detail the services rendered by the

two firms. In making the allowances it found and properly took into account that there was some duplication of services rendered by the New York and Chicago firms, *Finn* v. *Childs Co., supra; Newman & Bisco* v. *Realty Associates Securities Corp., supra;* that certain of the services rendered related to matters that did not need legal action or require advice of counsel; that the issues dealt with by counsel were not complex, *Newman & Bisco* v. *Realty Associates Securities Corp., supra; In re McGrath Mfg. Co.*, 95 F. Supp. 825 (D. Neb. 1951); that approximately half of the recorded time spent by the New York firm was contributed by a junior associate, *Finn* v. *Childs Co., supra;* that during the period for which compensation was being sought for them by the collateral trustee, the Chicago firm was receiving an annual retainer of $15,000 from Ford Hopkins.

Ruskin does not demonstrate that these findings of the district court were clearly erroneous. Nor does he show that the court's award made on the basis of those findings, an award in accord with the recommendation of the SEC, was an improper one. With respect to SEC recommendations in such matters, we said in *Finn* v. *Childs Co., supra,* at page 438:

> "[T]he figures presented by the SEC are not 'mere casual conjectures,' but are 'recommendations based on closer study than a district judge could ordinarily give to such matters.' Frank, supra, 18 N. Y. U. L. Q. Rev. 317, 1941. We agree with District Judge Kirkpatrick's apt statement 'that the Commission is about the only wholly disinterested party in the proceeding and that, while it may not be entirely familiar with "problems of making both ends meet in a law office" referred to by counsel, its experience has made it thoroughly familiar with the general attitude of the Courts and the amounts of allowances made in scores

of comparable proceedings.' In Re Philadelphia & Reading Coal & Iron Co., D. C. E. D. Pa., 61 F. Supp. 120, 124."

We cannot say that here the broad discretion with which the district judge, in the first instance, must of necessity be empowered in this type of case, see *Johnson* v. *Carolina Scenic Stages*, 242 F. 2d 263 (4 Cir. 1957), has been abused.

Accordingly, we affirm that portion of the district court's order disposing of the claims of the collateral trustee for compensation for himself and for allowance with which to compensate his attorneys; we reverse the portion of that order that denies interest on the unpaid installment notes at a rate in excess of 4% per annum from August 17, 1955 forward; and the cause is remanded for further proceedings not inconsistent with this opinion.

WASHINGTON, *Circuit Judge* (concurring in part and dissenting in part):

I would affirm the District Court's judgment in its entirety. As to the variable interest claim, I think the District Court correctly viewed the matter as one for the application of equitable principles, whether the corporation was solvent or insolvent. It carefully weighed the equities, see 164 F. Supp. 130, at 136-140, and concluded that the extra interest should not be allowed. I do not think it abused its discretion, and would not disturb its holding.

(14034)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 592

CHARLES H. GRIFFITHS, TRUSTEE IN REORGANIZATION OF GENERAL STORES CORPORATION,
Petitioner,

vs.

LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954,
Respondent.

On Petition For A Cross Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT, LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954, IN OPPOSITION

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BRIEF FOR RESPONDENT, LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954, IN OPPOSITION

OPINION BELOW

Petitioner is attempting to review a part of the judgment of the United States Court of Appeals entered on August 26, 1959, reversing a part of the judgment of the United States District Court for the Southern District New York refusing to allow Respondent interest on fully secured notes of the Debtor at the contract 6% rate after the date of their accelerated maturity. The opinion of the Court of Appeals is reported at 269 F.2d 827.

JURISDICTION

Petitioner is seeking a review out of time.

The time for Petitioner to file his petition expired November 24, 1959. No petitions for rehearing were filed within the time (15 days) allowed by the rules of the Court of Appeals or during the ninety-day period following the entry of its judgment on August 26, 1959.

Petitioner's reference to his motion in the Court below to file a petition for rehearing out of time is *dehors* the record. The motion was filed December 1, 1959, and the Court below denied it on December 11, 1959. This did not revive Petitioner's lost right. *Morse* v. *U.S.*, 270 U.S. 151, 154; *Federal Trade Commission* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206.

Petitioner seeks to invoke the jurisdiction of the Court out of time because of an extension granted Respondent. On November 26, 1959, Mr. Justice Harlan (in No. 369) granted Respondent an extension, on Respondent's timely application therefor, to file Respondent's petition to review an unrelated and separate part of the judgment of the Court below which affirmed a part of the judgment of the United States District Court with respect to Respondent's claim for compensation and expenses.

ARGUMENT ON JURISDICTION

Petitioner cites no authority and gives no reasons for his assertion that an extension to Respondent to seek relief here from a ruling below adverse to Respondent automatically extends Petitioner's time to seek relief here from a ruling below adverse to Petitioner.

Petitioner's right to complain here of an adverse ruling of the Court below is dependent upon his own appli-

cation for review. A party who fails to apply for a review cannot here seek relief from any adverse ruling of the Court below in a proceeding here by another party involving the same judgment. *Hubbard* v. *Tod*, 171 U.S. 474, 495; *Bolles* v. *Outing Company*, 175 U.S. 262, 268 and cases cited; *Warner* v. *Independent Pier Co.*, 278 U.S. 85; *Alexander* v. *Cosden Co.*, 290 U.S. 484, 487; *Morley* v. *Maryland Casualty Co.*, 300 U.S. 185. In *Alexander* v. *Cosden*, *supra*, this Court said:

> "The defendant alone petitioned for review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the Court of Appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former it has acquiesced and become concluded by not *seasonably petitioning for a review*. (Citing cases.)" (Emphasis supplied)

As Petitioner seeks a review of rulings of the Court below adverse to him, he should have filed his petition seasonably. "It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period." *Federal Trade Comm.* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 213; *Boylan* v. *U.S.*, 257 U.S. 614.

A cross appeal out of time must be dismissed, although the record then be before this Court on a timely appeal. *Farrar* v. *Churchill*, 135 U.S. 609, 612-13.

The extension granted Respondent affords no shelter to Petitioner. The order of Mr. Justice Harlan granted additional time in the cause of *Lewis J. Ruskin, Trustee*

Petitioner v. *Charles H. Griffiths, Trustee,* docketed as No. 569, for the filing of the petition for writ of certiorari, and hence by its terms granted additional time only to Respondent.

The rules of this Court (Rule 34, paragraphs 2, 3 and 4) establish that the extension of time is to the applicant alone. In each paragraph reference is to an extension of the "time within which *a party* may petition for a writ of certiorari" (Emphasis supplied). Paragraph 4 makes it "the duty of the *party* to whom *such extension is granted* to give all *other* parties to the proceeding prompt notice thereof" (Emphasis supplied). By paragraph 2 the application is deemed timely "if presented to the clerk within the period sought to be extended".

The Petitioner had requested no extension, and the time therefor, as well as for the petition, had elapsed.

The statute (28 U.S.C. §2101(c)) requires a showing of good cause for an extension of time in which to apply for a writ of certiorari. Petitioner shows none.

The good cause set out in Respondent's application cannot be extended to Petitioner. Respondent's application showed that Petitioner had applied to the Court below for an order recalling its mandate; that Petitioner there represented he would apply to this Court for a writ of certiorari; that Respondent thereupon went forward and prepared his petition for a cross-writ to be docketed upon the record to be filed by Petitioner; that Respondent's petition was printed and ready for filing in the office of the Clerk of this Court on the due date; that when Petitioner failed to present a timely petition, Respondent had no alternative but to apply on the due date for an extension of time in which to file a record and docket his petition.

Petitioner's neglect, to the surprise of Respondent's counsel, constituted good cause for an extension of time for Respondent per the order of Mr. Justice Harlan. But Petitioner's own neglect cannot constitute "good cause" for additional time to Petitioner.

By sleeping on his right to apply for timely relief from this Court, Petitioner has abandoned his right for Supreme Court review.

CONCLUSION

The petition for certiorari should be dismissed.

QUESTION PRESENTED

Whether the Court of Appeals was warranted in concluding under the facts and circumstances of this case, that equitable principles require payment to secured creditors of simple interest at the contract rate on overdue principal where the maturity was found by the District Court to have been validly accelerated before the amended petition under Chapter X was filed, the subsidiary companies, whose stock was held as security, earned $1,472,000.00 during the entire period (many times the interest requirement for the period), the notes and interest were fully secured, there was no unjust delay by the secured creditors and a plan of reorganization (confirmed under Section 216(7) without the consent of the secured creditors and in which existing shareholders participate) provides for payment of the secured creditors in full in cash and the surrender of their security to the reorganized debtor.

STATEMENT

On May 19, 1954, the Debtor, General Stores Corporation, purchased all of the outstanding stock in Ford Hopkins Company ("Ford") operating from Chicago, Illinois, a chain of some fifty retail drug stores in Illinois, Indiana, Iowa and Wisconsin. To secure the payment of the balance of the purchase price owing to Lewis J. Ruskin and Rexall Drug Company, evidenced by Debtor's two notes to their orders respectively, the Debtor, pursuant to a Collateral Agreement made with Lewis J. Ruskin, as Collateral Trustee, and dated May 19, 1954, transferred to Lewis J. Ruskin, as Trustee (Respondent), with full and immediate voting rights, all the stock in Ford and also in Stineway Drug Company ("Stineway") which operated a chain of retail drug stores in Chicago.

On October 18, 1954, the Debtor filed its petition in the United States District Court for the Southern District of New York under Chapter XI of the Bankruptcy Act for an arrangement with its unsecured creditors, and was continued in possession.

The notes and Collateral Agreement provided for interest after date at 4% per annum until maturity and 6% per annum on all overdue principal (R. 2a, 8a, 23a). The notes and Collateral Agreement provided that, among other events of default, the filing by Debtor of a petition for an arrangement under the Bankruptcy Act would constitute an event of default and entitle the Respondent or the noteholders to declare the notes immediately due and payable (R. 6a, 12a, 23a). This they did on August 17, 1955. The District Court found that the said notes by said declaration became due and payable on August 17, 1955, and that there had been no waiver of

or estoppel against the default or acceleration (R. 307a), saying: "I have concluded that the principal of the notes was validly accelerated and became overdue on August 17, 1955."

This occurred more than eight months prior to the Debtor's filing (on April 30, 1956) of its amended petition for reorganization under Chapter X of the Bankruptcy Act, and at a time when the District Court had no jurisdiction over secured creditors (except only to stay a foreclosure of security for cause shown, 11 U.S.C. § 714).

After the maturity of the secured debt had been accelerated, Debtor requested Respondent not to foreclose, stating it was negotiating various merger possibilities with a view to payment of the secured notes (R. 82) and later advised that one Richard Goodman was interested and had the money to pay the notes (R. 83). Goodman, the underwriter of the confirmed reorganization plan, began in November, 1955, his purchases of stock in the Debtor and, later, of claims of its unsecured creditors. Prior to that time Goodman had no interest in the Debtor.

On April 30, 1956, the Debtor filed its amended petition under Chapter X, which was approved May 1, 1956, and pursuant to which Petitioner, Charles H. Griffiths, was appointed its Trustee.

During the entire period of the pendency of the Chapter XI and Chapter X proceedings, Respondent was alone in control of and operated the two subsidiaries. Neither the Debtor in possession nor the Reorganization Trustee had or exercised control. The earned income of Ford and Stineway during the entire period exceeded $1,372,000.00, many times the 6% interest requirement for the entire period (Pet. 7, 8). The intimation in

the Petition (Pet. 16) that Respondent should have declared dividends aggregating $500,000 is contrary to the finding of the District Court that: "To have withdrawn these funds from the subsidiaries might have imperiled their financial position to the detriment of all concerned" (Pet. 38).

Extended hearings were held upon a plan of reorganization, unanimously objected to by the secured creditors, seeking to provide only part payment of the secured debt, an extension of the maturity of the balance payable in seven annual instalments with 4% interest annually, the transfer of control of the pledged collateral to the Debtor (of whom Goodman would then be in control), a compulsory dividend by Ford and Stineway to pay a portion of the funds required under the proposed plan and the recovery of $112,696.08 allegedly due from Respondent. Late in November, 1957, the plan was amended to provide for payment of the secured creditors in full in cash with 4% interest and the additional 2% interest as may be finally determined by the courts, an extension of the time of payment of unsecured indebtedness with 3% annual interest, and shareholder participation at the rate of three shares exchanged for one in the reorganized Debtor. The debtor was solvent and the pledged stock in Ford and Stineway constituted its principal assets.

The District Court directed that the consent of the secured creditors was not required (under Section 216(7)) and in due course the plan was confirmed (R. 333a) without their consent.

Ruskin, following approval of the amended plan, petitioned the District Court to determine the amount of his lien upon the collateral for the debt, interest, compensa-

tion for his services and reimbursement for his expenses, including his attorneys' fees. The District Court's order of June 12, 1958 (R. 315a, 340a) refused to allow interest at the 6% rate after August 17, 1955, as provided for in the notes and the Collateral Agreement, and adjudicated the amount of the debt and the interest thereon at 4%. On Respondent's appeal from said order, the Court of Appeals reversed it with respect to the interest rate and allowed it at 6% per annum after August 17, 1955.

The Court of Appeals held that equitable considerations of the case do not deprive Respondent of the benefit of his variable interest contract, that the variable interest provision is a lawful, useful and equitable business practice, that the Debtor was solvent, and had filed its petition under Chapter XI because it believed it beneficial to itself to do so, and concluded:

> "in a case such as this, where there is no showing that the creditor entitled to increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act."

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to review the judgment of the Court below on interest without showing that any of the accepted grounds for granting certiorari is present here. It is submitted that the decision below on interest is correct, presents essentially a factual question, and is not in conflict with any decision of this Court or with any other appellate decision. Petitioner would have this Court expend its limited time in resolving questions which are abstract and irrelevant to the case.

I.

A contract provision that a voluntary bankruptcy proceeding is an event of default is not against public policy.

A filing under Chapter XI of the Bankruptcy Act gives the Court the same jurisdiction, powers and duties as in a bankruptcy proceeding upon adjudication (11 U.S.C. §712). To like effect is an approval of a petition under Chapter X (11 U.S.C. §514).

In *Central Trust Co. v. Chicago Auditorium Association*, 240 U.S. 581, this Court held that an adjudication in bankruptcy, despite the silence of a contract on the subject, would constitute a material anticipatory breach of the contract, although not then otherwise in default, and would permit of proving all damages consequent on such breach. This Court stated:

> "Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement" (240 U.S. 581 at 591).

Since bankruptcy is by operation of law an anticipatory breach, there can be no public policy to prevent the parties from expressly contracting that it shall constitute a default and making provision for such event. *Irving Trust Co. v. A. W. Perry, Inc.*, 293 U.S. 307, aff. 69 F. (2d) 90; *Wm. Filene's Sons Co. v. Weed*, 245 U.S. 593.

It is obvious that the contract with the Debtor did not prohibit it from resorting to bankruptcy proceedings of any kind. But the effect of a bankruptcy proceeding, when resorted to, as an anticipatory breach and a default, is properly the subject of a contract between the parties and not violative of public policy.

II.

The decision of the Court of Appeals does not present the question posed by Petitioner of the extent of the reorganization court's equitable powers with respect to interest.

The Court of Appeals did apply correctly the rule of law recognized by the District Court, namely, that equitable principles governed. The Court below differed with the District Court with respect to where the equity lay in the instant case.

The Court of Appeals exercised its discretion in determining what is or is not equitable. It took into account the following salient equitable considerations: There is nothing inequitable in the variable interest contract in the case at bar. It is a useful and equitable business practice to the advantage of the borrower. The Debtor had expressly agreed that the result of its filing a Chapter XI petition, would, on acceleration, bring the 6% rate into effect. The Debtor was solvent and hence the usual equitable consideration in bankruptcy of not accruing interest after the filing of the petition would not apply. There was no showing that Respondent caused any unjust delay in the proceeding. The Debtor filed its Chapter XI petition to serve its own interests. It would be the contrary of equity here to allow Debtor to escape from the expressly-bargained-for result of its act.

In reversing the District Court, the Court of Appeals correctly gave no consideration to the untenable views of the District Court on the subject of where the equity lay. The grounds on which the District Court acted presented no equity, as is clear from a brief reference to them.

Four grounds were asserted by the District Court. The first, that Respondent "may" have been "at least partially responsible" for the protracted length of the proceedings, determined neither that Respondent was so responsible nor that his action was improper. The Court of Appeals held there was no showing that Respondent caused any unjust delay.

The second reason, that Respondent's security was ample, is no equitable ground for denying Respondent his rights under his contract, particularly where the pledged stock and the subsidiaries they controlled were never under the management or control of the District Court or Petitioner, and earned $1,472,000 in the period involved—an equitable consideration in Respondent's favor. *Sexton v. Dreyfus*, 219 U.S. 339, 346.

The third reason was that Respondent would be paid some years before the loan would have matured by lapse of time. But this is only the natural consequence of a valid acceleration. Moreover, this Court in *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 127, held that the fact secured notes would not have matured for many years in the future but for the filing of a reorganization petition was no consideration for stockholders' participation in the security under a plan of reorganization. To give it such consideration, this Court held was a denial of the secured creditors' absolute priority.

The fourth reason was an alleged inflation of the reorganized Debtor's capital structure. The District Court itself rebutted this reason in pointing out that under the Amended Plan of Reorganization of Debtor the additional funds required to pay Respondent's claim for the interest at 6%, would be advanced by Goodman, who would receive therefor additional shares of stock in the reorganized Debtor. Under such circumstances the assets of the reorganized Debtor are not depleted, and the only effect is to reduce, to the extent of the advance, the participation of existing stockholders in the pledged collateral. Goodman receives stock at a bargain price for his advance, and the inequity, if any, is in the Plan proposed by Petitioner and underwritten by Goodman, and not in the receipt by Respondent of the contract interest.

The foregoing reasons of the District Court are not equitable considerations to override those found by the Court of Appeals. In rejecting them and itself determining on the record where the equity lay, the Court of Appeals gave full effect to the equitable considerations applicable to the case at bar. The Court of Appeals did not, as asserted by Petitioner, limit the reorganization Court's equitable powers with respect to interest.

III.

The assertion by Petitioner that Debtor was insolvent at the time it filed its Chapter XI petition is not raised in or supported by the record.

Petitioner seeks to inject here, without foundation and gratuitously, a doubt with respect to Debtor's solvency when it filed its Chapter XI petition. This issue of Debtor's solvency or insolvency as at October 18, 1954 was never raised in the record.

Petitioner's alleged record support for its newly-raised point is misplaced. Trustee's Exhibit 6 and the testimony referred to by Petitioner (Pet. p. 6) showed the financial condition of Debtor as at May 11, 1957, not October 18, 1954. Petitioner does not deny, and on the contrary asserts, that Debtor was solvent in 1957.

This obviously does not show insolvency in October, 1954. Reference to Debtor's financial distress in 1954 is no proof of Debtor's insolvency. Actually, Debtor in its Chapter XI petition averred only that it was unable to pay its debts as they matured, not that it was insolvent, and listed its assets at about $5,000,000 and its liabilities at about $4,000,000. *In re General Stores Corporation*, 129 F. Supp. 801, 803; *General Stores Corporation v. Shlensky*, 222 F. 2d 234, 235.

IV.

The decision of the Court of Appeals does not conflict with any decision of this Court.

In *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 (1946), this Court denied recovery of interest on interest to secured creditors in a contest between them and unsecured creditors; the debtor there being insolvent. This Court took jurisdiction not because the judgment of the Court of Appeals was erroneous, since it was affirmed on certiorari granted, but because in that case the Court of Appeals and the District Court, while disagreeing as to the applicable local law, had agreed that the case was to be determined solely by local law. This Court justified the disallowance of interest on interest in Vanston on the basis of equitable principles. This Court stated that equitable considerations, not local law, would govern the allowance of interest in the administration of bankruptcy estates in the Federal Courts.

In the case at bar the Court of Appeals did apply the correct rule of law, namely that equitable principles would govern. It decided the case on the basis that the equity lay with Respondent.

The Court of Appeals distinguished the difference in result from Vanston, not on the grounds that equitable considerations do not apply where the debtor is solvent, but that the bankruptcy equitable principle of ceasing to accrue interest on the debtor's obligations at the beginning of the proceedings does not apply where the debtor is solvent. The Court of Appeals stated (Pet. 68) that this Court itself "carefully noted that this rule with respect to simple interest did not apply where the contest was between a creditor and stockholder of the debtor:

> 'But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor.' 329 U.S. at 164."

Since the Court of Appeals decided the interest question on the basis of equitable principles, and not local law, this Court is not asked to establish any new principle of law nor to correct any failure of the Court of Appeals to apply a correct rule of law. This Court is asked merely to review the discretion exercised by the Court of Appeals on the facts and circumstances of the case at bar in deciding what is or is not equitable.

V.

The petition presents no conflicts between the circuits.

Petitioner does not suggest that there is a conflict between the decision in the case at bar and a decision of another circuit.

However, he quotes extensively from *United States Trust Company of New York* v. *Zelle*, 191 F. 2d 822 (8 Cir. 1951) where the Court continued the pre-maturity rate after maturity. There the mortgage provided for the payment of interest at 4% per annum until the maturity of the bonds, but was silent on the rate of interest after maturity. The Court stated that the terms of the mortgage "by fair implication called for the payment of interest at 4% after maturity." The decision implies that, had the contract expressly provided a post-maturity rate of interest, the Court would have enforced it. The Court stated pp. 825-826:

> "And we conclude that the circumstances amply justify the conclusion of the trial court that *in the absence of a definite provision in the bonds fixing the rate of interest after maturity*, the preferred status of these secured bondholders entitle them on equitable principles to interest during the remaining period of bankruptcy at 4 per cent . . ." (Emphasis supplied.)

It is clear there is no conflict to be settled by this Court.

VI.

The petition seeks review of abstract and irrelevant questions.

The amended Plan of Reorganization of Debtor, as confirmed, provides (Article 4-D(2)) for the payment in full to Respondent as representative of the secured creditors of principal, plus interest at the rate of 4% per annum from May 19, 1954, "plus such other sum, if any, which the courts may finally determine to be payable on the secured creditors' claim for an additional 2% interest from August 17, 1955 . . .".

The order approving the plan provided that the secured creditors

"are not affected by the plan as their claims will be paid in full in cash, hence their acceptance of the plan is not required."

The Debtor (whose stockholders participate under the Plan) has taken advantage of the provision of Section 216 (7) (11 U.S.C. § 616 (7)) of the Bankruptcy Act, to reorganize without the consent of the entire class of secured creditors having a lien on the collateral pledged to Respondent. The provisions of the confirmed plan are, in effect, those of a redemption in equity of the collateral. Thus the Debtor is on its part obliged to do equity. Equitable considerations do not permit a reduction of a solvent debtor's legal obligation on its own redemption.

The determination by the Court below on interest turns on the particular facts of the case at bar. As the Court stated (Pet. 71):

"in a case such as this . . . it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act".

Questions posed by Petitioner derive from cases of distribution of assets by a court administering an estate, and are here abstract and irrelevant.

CONCLUSION

The petition for a cross-writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

Chicago, Illinois
January 8, 1960

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 592

CHARLES H. GRIFFITHS, Trustee in Reorganization of GENERAL STORES CORPORATION,

Petitioner,

against

LEWIS J. RUSKIN, Collateral Trustee,

Respondent.

REPLY BRIEF FOR PETITIONER

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Respondent.

REPLY BRIEF FOR PETITIONER

Two principal issues raised by the respondent's brief in opposition to the Reorganization Trustee's petition for Cross-Writ of Certiorari are:

1. Whether said petition for cross-writ was timely filed and

2. Whether the Court of Appeals was correct on the merits and applied equitable considerations in reaching its determination.

I

Jurisdiction

Section 2101(c) of 28 U.S.C. provides:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil

> action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

To the same effect regarding extensions of time, see Rule 22 of the Rules of this Court.

While the need for finality requires some time to be specified as the ultimate limit within which a petition may be filed, the last sentence of that subsection makes it evident that there is no public policy consideration which prevents any extension of time beyond ninety days. In fact, one hundred and fifty days is fixed as the outside limit. The words of the section contain no restriction on the number of parties for whom such an extension may be granted.

It is not disputed that if the respondent herein had not applied for an extension of time within which to file a petition for certiorari, the filing of this petition for cross-writ would not be timely. The cases cited by the respondent on page 3 of his brief in opposition stand for the general proposition that a petition not filed within the prescribed time can not be heard. That rule is conceded. However, the issue in this case is whether the order by Mr. Justice Harlan extending the time for filing on the application of the Collateral Trustee, extended the time of the Reorganization Trustee as well to file a petition for certiorari.

The order of the Court of Appeals in the instant case was entered on August 26, 1959. On November 24, 1959 an application for an extension of time was made by counsel for the Collateral Trustee to Mr. Justice Harlan. This application was within the ninety day period prescribed

by the statute. By order dated November 26, 1959 Mr. Justice Harlan signed an order which provided:

> "Upon consideration of the application of counsel for the Petitioner, it is
>
> ORDERED, that the time for filing petition for Writ of Certiorari in the above entitled cause be, and the same is hereby, extended to and including December 15, 1959."

The said order does not limit the parties for whom the time has been extended. It seems clear from the order itself that there was a general extension of the period to and including December 15, 1959. The petition for a cross-writ was duly filed by counsel for the Reorganization Trustee with the Clerk of this Court on December 15, 1959.

The respondent cited no authority in his brief in opposition for his proposition that the extension is not available to petitioner (p. 3). He treats the fact that the clerk gave individual docket numbers to his petition (569) and to the instant petition for a cross-writ (592) as two separate proceedings. However, Rule 21 of the Rules of this Court provides in part:

> "5. A party seeking a cross-writ of certiorari to review in this Court the same judgment need not file any record additional to that filed by the petitioner."

Thus it seems clear that since the same judgment of the Court of Appeals is sought to be reviewed, under the Rules of this Court it is the same proceeding or cause.

A fair reading of Rule 34 of the Rules of this Court entitled "Computation and Enlargement of Time" does not support the position asserted by respondent in his opposition brief (p. 4). In fact the provision of subsection 4 of Rule 34 of said Rules requiring that notice of

any extension granted be given by the applicant to all other parties to the proceeding, would appear to have no significance unless the order extended the time of all other parties to file a petition for certiorari also.

Research of the decisions of this Court reveals no case decided on this question. The case of *Farrar* v. *Churchill*, 135 U. S. 609, cited by respondent is not applicable in this case. There, on September 2, 1885 the District Judge filed an opinion dismissing the bill and the cross-bill. On December 1, 1885 an appeal was duly taken by the complainant. On October 31, 1887 the defendants filed a petition for cross-appeal. The cross-appeal was dismissed as not being within the then permitted two year period. The Reorganization Trustee concedes the correctness of that holding but submits it is not applicable to the instant case where there was a valid extension of time for filing within which the petition was filed.

Although it is not directly involved in this case it may be helpful on the question of policy to be established by this Court to refer to Section 578a of the New York Civil Practice Act which provides as follows:

> "Time to Appeal extended in certain cases. In any action or proceeding where an appeal is taken the party upon whom the notice of appeal is served must serve a notice of appeal within ten days after such service or within the time otherwise provided by law, whichever is longer.
>
> A third party defendant or subsequent party plaintiff who is served with a notice of appeal by the party who brought him into the action must serve a notice of appeal within ten days after such service or within the time otherwise provided by law, whichever is longer."

This section was originally enacted and subsequently amended at the suggestion of the Judicial Conference of

the State of New York to avoid the filing of unnecessary notices of appeal for the sake of protecting a party's position.

As the eighteenth annual report of the Judicial Conference of the State of New York noted, statistics are impossible to compile regarding the savings of appellate court's time on appeals which are taken for the purpose of protecting a position rather than because of real interest in a determination of the merits, but it is self-evident that parties who feel that they have everything to gain and nothing to lose by asking for an extension of time which can only accrue to their benefit may reconsider if they realize that any extension given will also inure to the benefit of the other party to the proceeding. New Jersey has a similar provision with respect to cross appeals. N.J.R.R. 1:3-2.

In the instant case the petition for extension of time was filed by Chicago counsel for the Collateral Trustee two days before the ninety day period expired. Notice of the ex parte application was not received by the attorney for the Reorganization Trustee until November 27, 1959, after the ninety day period expired and in fact after the order granting the extension was signed. It is only fair and equitable to give the Reorganization Trustee the same extension of time to file a petition for certiorari.

II

Refutation of Argument on the Merits

With respect to the cases cited at page 10 of respondent's brief in opposition:

The case of *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, merely relates to the provability of claims in ordinary bankruptcy proceedings. It has no relation to the public policy questions raised by petitioner in this proceeding. In fact this Court in that

case further on page 591 stated:

> "Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in the bankrupt estates, while the bankrupts themselves, as a necessary corrollary, were left still subject to actions for non-performance in the future, although without the property or credit often necessary to enable them to perform."

The case of *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, involved provability of rent claims in a proceeding not under the Bankruptcy Act, and *Irving Trust Co.* v. *Perry Co.*, 293 U. S. 307, involved provability of rent claims in a proceeding under the Bankruptcy Act prior to 1932.

With respect to points II and IV of respondent's brief (pp. 11-13 and 14-15):

The Court of Appeals did not invoke equitable considerations in reversing the District Court on the question of additional interest, but decided that if the debtor is solvent, the contract provisions govern, regardless of the equities. The Court of Appeals did not discuss the grounds enumerated by the District Court as the basis of its decision, but made the gratuitous statement (Pet. p. 71):

> "Undoubtedly the debtor filed its petition under Chapter XI because it believed it beneficial to itself to do so, and in a case such as this, where there is no showing that the creditor entitled to the increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act."

See point 1 (c) of the petition for cross-writ of certiorari, for a full discussion of the facts.

With respect to point III of Respondent's brief (pp. 13-14):

Since the sole distinction of the *Vanston* case made by the Court of Appeals was that in the instant case the debtor was solvent, the issue is of great importance and adequate references to the facts will be given in the brief and argument if the petition for cross-writ is granted. It should not be dealt with summarily.

All that point V (p. 15) reveals is that this is the first case which has directly raised the questions involved. This Court need not wait for a conflict of decisions to arise in the various Courts of Appeal so long as the decision below was in conflict with the decision of this Court.

With respect to point VI of the respondent's brief (pp. 16-17) the questions raised in the petition for cross-writ are not abstract and irrelevant. It seems particularly pertinent that if the *Vanston* case is distinguishable on the question of solvency, to determine why the Collateral Trustee is not entitled to interest on interest in this case, since the Collateral Agreement expressly provided therefor.

III

CONCLUSION

The petition for cross-writ of certiorari was timely filed and should be granted.

Dated: White Plains, New York, January 15, 1960.

Respectfully submitted,

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